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No. —

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE RENEGOTIATION BOARD, PETITIONER

v.

BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Renegotiation Board, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in these cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a-44a) is reported at 466 F. 2d 345. The orders of the district court (App. B, *infra*, pp. 45a-60a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1972. On October 4, 1972, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including November 18, 1972. On November 8, 1972, the Chief Justice further extended the time for filing a petition for a writ of certiorari to and including December 4, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Freedom of Information Act authorizes the district courts to enjoin agency proceedings until the court determines whether litigants before the agency are entitled to documents sought under the Act.

2. If the district court has such jurisdiction, whether it was properly exercised in enjoining proceedings under the Renegotiation Act until the court can determine whether contractors whose profits are being renegotiated are entitled to the documents requested.

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. 551 *et seq.*, and of the Renegotiation Act, 50 U.S.C. App. 1211 *et seq.*, are set forth in Appendix C, *infra*, pp. 61a-67a.

STATEMENT

The plaintiffs in each of these cases, consolidated for purposes of appeal below, are contractors whose profits on defense contracts are undergoing renegotiation pursuant to the Renegotiation Act, 50 U.S.C.

App. 1211, *et seq.*¹ During these proceedings, the contractors requested certain documents from the Renegotiation Board under the Freedom of Information Act. The Board produced some of the documents, but refused to release others, including staff reports analyzing the basis for the staff's recommendation on the amount of excess profits involved. (See the joint appendix below, pp. 7a-9a, 12a-15a, 36a-37a, 61a-68a, 80a-82a, 103a-105a, 108a-111a.)

The contractors then filed suit in the district court under the Freedom of Information Act (5 U.S.C. 552(a)(3)) to compel disclosure; they also sought a stay of the renegotiation proceedings pending a decision on the merits of the Information Act claim.

¹ The procedures required by the Renegotiation Act and its implementing regulations are discussed at length in the majority and dissenting opinions (App. A, *infra*, pp. 5a-8a, 41a-43a). Briefly, the Act and regulations provide for a series of negotiating conferences, first with regional board staff, then with a regional board and finally with the Renegotiation Board. The regulations grant the contractor a right to an oral statement from the board staff as to the reasons for any excess profit recommendation, and a summary of the reasons for the regional and national boards' determinations of excess profits. See 32 C.F.R. 1472.3(f), (i). Before the entry of any final order to repay excess profits, the Board is required by the Act and regulations to provide the contractor with a detailed statement of the facts relied on and the reasoning behind the Board's determination. 50 U.S.C. 1215(a); 32 C.F.R. 1472.4(d). This final order may now be appealed to the Court of Claims, which decides the matter *de novo*, (prior to July, 1971, such *de novo* review was in the Tax Court, with review of the latter's decision in the court of appeals.) Thus, the regulations and the Act provide for substantial and specified disclosure of the basis for the boards' actions at each step of the renegotiation process (App. C, *infra*, pp. 62a-67a).

(App. A, *infra*, pp. 3a-4a). The contractors alleged that the continuation of renegotiation proceedings without their being given access to the documents in the Board's possession would constitute a denial of due process (Appendix below, pp. 5a, 44a, 78a).² The district court granted each of the requested injunctions without opinion (App. B, *infra*, pp. 45a-60a).

The court of appeals, one judge dissenting, affirmed the injunctions. It held that (1) the Freedom of Information Act grants jurisdiction to enter such injunctions, and (2) the exercise of such jurisdiction was proper when the contractors were in the midst of procedures provided by the Renegotiation Act (App. A, *infra*, pp. 4a-5a). The court analyzed the Renegotiation Act, and concluded that petitioners had shown a need for judicial intervention to enjoin the continuation of the proceedings until the contractors' rights to access to the information have been determined. The court then held that the Freedom of Information Act, while not expressly authorizing injunctions against agency proceedings, implicitly conferred this jurisdiction. It further held that the district court properly exercised its jurisdiction, since the exhaustion doctrine did not prevent the court's

² At the time these actions were brought, the regional board had tentatively determined that Astro Communication Laboratory had realized excessive profits of \$225,000; the Renegotiation Board had ruled that Bannercraft Clothing Company had realized excessive profits totalling \$1,625,000, but no final order had been entered pending further negotiation; and David B. Lilly Company was meeting with the regional board personnel, who had tentatively determined that the company had realized excessive profits of \$700,000 (App. A, *infra*, p. 9a).

intervention in the pending proceedings under the particular circumstances of these cases. It concluded that the district court had not abused its discretion in enjoining the administrative renegotiation proceedings until the Freedom of Information Act issue was determined.

Judge MacKinnon, dissenting, concluded that the Freedom of Information Act's creation of a specific right with a specific remedy to enforce it rendered the judicial review provisions exclusive (App. A, *infra*, pp. 32a-39a). On the exhaustion issue, he found dispositive this Court's decisions holding that the doctrine of exhaustion of remedies precludes enjoining Renegotiation Board procedures to permit the judicial resolution of a challenge to Board procedures (App. A, *infra*, pp. 39a-44a).

REASONS FOR GRANTING THE WRIT

This case presents an important question regarding the scope of relief available under the Freedom of Information Act. The court of appeals' holding that the Act confers jurisdiction to enjoin pending administrative proceedings ignores the specific and limited injunctive remedy Congress provided to carry out the substantive provisions of the Act; it is inconsistent with and unnecessary to effectuate the Act's purposes; and it conflicts with a decision of the Court of Appeals for the Sixth Circuit that the courts have no such jurisdiction under the Act.

In addition, in permitting interruption of renegotiation proceedings prior to the exhaustion of the pre-

scribed administrative and judicial proceedings, the decision below misconstrued the Renegotiation Act, and is contrary to the rulings of this Court in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, and *Lichter v. United States*, 334 U.S. 742.

1. (a). In the Freedom of Information Act, Congress created a right of public access to governmental information which does not come within the statute's enumerated exceptions. To effectuate that right, it gave the district courts jurisdiction to "order the production of any agency records improperly withheld" and to punish, by contempt, any refusal to comply with such order. 5 U.S.C. 552(a)(3). The House Committee report pointed out that the Act "contains a specific remedy for any improper withholding of agency records by granting the U.S. district courts jurisdiction to order the production of agency records improperly withheld." H. Rep. No. 1497, 89th Cong., 2d Sess., p. 9.

There is nothing in the terms of the Act, or its extensive legislative history, to suggest that Congress also intended to permit the courts to enjoin agency proceedings where documents are withheld. To read such a further remedy into the Act opens the door to interference with administrative proceedings not contemplated by the Act, and does so in order to serve the special interest of litigants before the agency in

obtaining access to internal agency documents, an interest the Act is not designed to protect.³

Congress specifically provided the remedy deemed necessary to carry out the purposes of the Act's requirement that appropriate internal agency documents be made available: 5 U.S.C. 552(a)(3) permits the courts to order the information produced and requires the courts to pass on such requests expeditiously. This remedy vindicates the public's right to information with minimum interference with agency activities. The decision below, on the other hand, greatly increases such interference, by encouraging parties before administrative agencies to seek to utilize the Information Act to "buy time" before an adverse order can be entered.

The Freedom of Information Act is, thus, a statute which has created a right and has provided a special remedy for enforcing that right, so that "that remedy is exclusive." *United States v. Babcock*, 250 U.S. 328, 331. This is not a situation where Congress intended

³ The majority found a Congressional intent to permit such injunctions in 5 U.S.C. 552(a)(2) and its legislative history. That section of the Act requires the agencies to make public their "final orders," "opinions," "statements of policy" and other general rules "that affect a member of the public." It has nothing to do with making internal documents of the agency available to a litigant before the agency, as the dissent points out (App. A, *infra*, pp. 34a-36a). The specific sanction for violation of this Section, that unpublished opinions, policies, and rules may be relied on or cited against only those with actual notice, adequately protects the interests of litigants before an agency.

the courts to exercise "the broad equitable jurisdiction that inheres in courts," since the proposed exercise of that jurisdiction is not "consistent with the statutory language and policy, the legislative background and the public interest." *Porter v. Warner Holding Co.*, 328 U.S. 395, 403.

(b) The decision below, conflicts with the holding of the Sixth Circuit in *Sears, Roebuck and Co. v. National Labor Relations Board*, 433 F. 2d 210, that the Information Act does not authorize the courts to enjoin agency proceedings. There the court, rejecting an attempt to enjoin proceedings before the National Labor Relations Board until the Board produced documents sought under the Information Act, held:

Essentially, the form of relief plaintiff seeks would result in early judicial review of a Board decision on permissible discovery, not an order to produce records. Plaintiff contends that jurisdiction for such an action is granted to the district courts by the Freedom of Information Act, 5 U.S.C.A. § 552(a)(3), which grants " * * * jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records * * *." Even assuming the dubious proposition that Congress intended to create an exception to its long-standing policy against enjoining the Board, plaintiff seeks neither an injunction or an order of the type described above. We therefore con-

clude that the district court properly dismissed the complaint for lack of jurisdiction * * *.

433 F. 2d at 211.*

Although there are distinctions between the character of proceedings before the Renegotiation Board and before the National Labor Relations Board, these differences are irrelevant to the question whether the Freedom of Information Act authorizes the courts to enjoin administrative proceedings where it is alleged that the agency has not complied with the disclosure requirements of that Act. In the light of its *Sears* decision, the Sixth Circuit would have denied the injunction against the further conduct of the renegotiation proceedings that the District of Columbia Circuit here granted.

2. The holding that a court may enjoin renegotiation proceedings prior to completion of the statutory

*In an earlier case, the District of Columbia Circuit appeared to have reached a result contrary to the instant decision. See *Sterling Drug Inc. v. Federal Trade Commission*, 450 F. 2d 698, 710-712. A number of district courts have reached the same result as the Sixth Circuit. *Holly Corporation v. The Renegotiation Board*, C.D. Cal., No. 69-198, decided February 11, 1969; *General Manufacturing Corp. v. The Renegotiation Board*, D. N.J., No. 965-70, decided November 5, 1970; *Grumman Corporation v. The Renegotiation Board*, D. D.C., No. 3097-70, decided October 20, 1970; *Missouri-Portland Cement Co. v. Federal Trade Commission*, D. D.C., No. 474-71, decided August 16, 1972.

administrative and judicial review procedures, and the reasoning by which the court below reached that decision, cannot be squared with this Court's decisions in *Lichter v. United States*, *supra*; *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*; *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540.

In those cases this Court held that the courts have no jurisdiction to interfere with pending renegotiation proceedings, for "Congress clearly and at the very least intended the Tax Court's functions [now the Court of Claim's functions] * * * to be fully performed, before judicial intervention should take place * * *." *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*, 331 U.S. at 771. That ruling was based upon a careful analysis of the Renegotiation Act and the Congressional intent "so far as possible, to relieve the interrelated processes from the tedious burden of litigation" (*id.*, at 770) in light of the "primary need for speed and definiteness in these matters." *Lichter v. United States*, *supra*, 334 U.S. at 791. The Court specifically rejected the contention that an injunction should be granted because the contractor was denied due process by the use of information in the Board's possession which it "had no opportunity to examine or rebut." *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*, 331 U.S. at 758-759, fn. 12.⁵ In *Lichter*,

⁵ Among items of information denied the contractor in *Aircraft & Diesel Equipment Corp.* was a statement of facts and reasons to which he was entitled under the Renegotiation Act. The contractor alleged that unless the Board were required to produce this prior to the administrative hearing, "such statement is of no benefit to the Plaintiff." Record, No. 95, October Term, 1946, Volume I, pp. 136, 142. This contention,

this Court pointed out that *de novo* proceedings are available at a later stage of the renegotiation process, and that informal proceedings were appropriate at the initial stages. 334 U.S. at 791-792.

The passage of the Freedom of Information Act has not changed these purposes or undercut these decisions. The reasoning of the court below, that an injunction against the administrative proceedings may be justified by the alleged need of the contractor for documents at an early stage of the renegotiation process, cannot be reconciled with those rulings.

The court of appeals misconstrued the Renegotiation Act when it concluded that the release of the documents sought, which include the Board's internal staff memoranda, is necessary to effectuate the purposes of the Act: i.e., meaningful negotiation between the parties.* To the contrary, the interference with the specific statutory and regulatory provisions governing the information which the Board must make available to contractors frustrates the Renegotiation Act's operation, because, as the dissenting judge

which is similar to the ground upon which the contractors here sought and obtained an injunction, was there held not to warrant injunctive relief.

* The court below does not question the contractors' need for the agency documents in order to discover "the strength of the Board's case against them and the facts on which the Board relies in assessing liability" (App. A, *infra*, p. 10a). It is at least arguable, however, that in the nature of the case, the contractors must be thoroughly familiar with all the significant facts concerning their case, and that what they want to know is how thorough the Board's investigation has been. In such a situation the contractors' "need" is hardly compelling enough to justify delaying the administrative process by injunction.

pointed out, "controlled access to information concerning the Government's position in the negotiations plays a significant role in the administrative process before the Board." (App. A, *infra*, p. 41a). In other words, unlike normal litigation, the renegotiation process under the Renegotiation Act does not contemplate comprehensive discovery by each side of the other side's case, in order to expedite the proceeding. The Act focuses upon negotiation and settlement, not adjudicatory determinations.

CONCLUSION

The court below has significantly misinterpreted the scope of the Freedom of Information Act and the purpose of the Renegotiation Act. Its conclusion with respect to the Freedom of Information Act is in conflict with that of the Sixth Circuit in *Sears*; with respect to the Renegotiation Act its decision conflicts with those of this Court. If unreviewed, the decision will encourage delays in administrative proceedings and thus interfere with the effective performance of the government's functions.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,685

BANNERCRAFT CLOTHING COMPANY, INC.

v.

THE RENEGOTIATION BOARD, APPELLANT

No. 24,778

ASTRO COMMUNICATION LABORATORY

A DIVISION OF AIKEN INDUSTRIES, INC.

v.

THE RENEGOTIATION BOARD, APPELLANT

No. 71-1025

DAVID B. LILLY Co., INC. ET AL.

v.

THE RENEGOTIATION BOARD, APPELLANT

Appeals from the United States District Court for the
District of Columbia

(1a)

Decided July 6, 1972

Mr. William D. Appler, Attorney, Department of Justice, with whom *Assistant Attorney General L. Patrick Gray, III* and *Messrs. Thomas A. Flannery*, United States Attorney at the time the brief was filed, and *Walter H. Fleischer*, Attorney, Department of Justice, were on the brief, for appellant. *Mr. Morton Hollander*, Attorney, Department of Justice, also entered an appearance for appellant.

Mr. Robert L. Ackerly, with whom *Mr. James J. Gallagher* was on the brief, for appellees in Nos. 24,685 and 24,778.

Mr. Burton A. Schwalb, with whom *Mr. Michael Evan Jaffe* was on the brief, for appellee in No. 71-1025.

Before *WRIGHT* and *MACKINNON*, *Circuit Judges*, and *MATTHEWS*,* *Senior District Judge*, United States District Court for the District of Columbia.

Opinion for the court filed by *WRIGHT*, *Circuit Judge*.

Dissenting opinion filed by *MACKINNON*, *Circuit Judge*, at p. 30.

WRIGHT, *Circuit Judge*: These consolidated appeals present important questions, unresolved in this jurisdiction,¹ as to the remedial powers of the District

* Sitting by designation pursuant to 28 U.S.C. § 294(c) (1970).

¹ But see *Sears, Roebuck & Co. v. NLRB*, 6 Cir., 433 F. 2d 210 (1970); Cf. *Sterling Drug Inc. v. FTC*, — — U.S. App. D.C. —, 450 F. 2d 698 (1971). In *Grumman Corp. v. Renegotiation Board*, D.C. Cir., No. 24,726 (Oct. 27, 1970), we dismissed without opinion an appeal from the District Court's refusal to grant a temporary restraining order on facts similar to those in these cases. However, denial of a temporary restraining order is generally not appealable. See, e.g., *Woods v. Wright*, 5 Cir., 334 F. 2d 369, 373 (1964).

Courts under the Freedom of Information Act, 5 U.S.C. § 552 (1970). The three appellees in these cases are each Government contractors subject to the Renegotiation Act of 1951, 50 U.S.C. App. §§ 1211-1233 (1970), an elaborate statutory scheme designed to recoup excessive profits made by those doing business with the Government. During the renegotiation process, each appellee filed with the Renegotiation Board a proper request for documents connected with the process. See 5 U.S.C. § 552(a)(3). In each case the Board rejected the request, citing one or more of the exemptions contained in the Information Act, 5 U.S.C. § 552(b)(1)-(9), and in each case the contractor then filed suit in the District Court to force production of the documents. See 5 U.S.C. § 552(a)(3).

On these appeals we are not asked to rule on the general applicability of the Information Act to the Renegotiation Board—an issue resolved by this court in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F. 2d 578 (1970). Nor are we faced with the task of evaluating the various constitutional and statutory arguments which the Board advances in an effort to prevent forced production of the documents. Those issues are still *sub judice* in the various District Courts, and it would be improper for us to express any views on them until a final order from the District Court is appealed to us.* Rather, the question which divides

* In one of the cases, *Astro Communications Laboratory v. Renegotiation Board*, the District Judge ordered production of the documents for *in camera* inspection so he could evaluate the force of the Board's arguments. Cf. *Soucie v. David*, — U.S. App. D.C. —, —, 448 F. 2d 1067, 1079 (1971). The Board's appeal from that order was consolidated with these cases for argument, but we remanded the issue to the District

the parties at this stage is the propriety of preliminary injunctions issued in each of these cases against continuation of the renegotiation process until the final status of the documents is determined. Appellees argued successfully in District Court that such an injunction was essential in order to preserve the *status quo* and prevent irreparable injury. Specifically, they claimed that without an injunction the renegotiation process would be completed long before the status of the disputed documents could be determined. Although completion of renegotiation would not formally moot the controversy, appellees contended, it would frustrate the purpose of the Information Act by depriving them of access to the documents during the period when such access would be useful.

In response the Board argued before the District Judges that the Freedom of Information Act nowhere conferred jurisdiction on trial judges to enjoin Board proceedings. Alternatively, the Board contended that, even if such jurisdiction could somehow be found, the doctrine of exhaustion of administrative remedies precluded equitable intervention in ongoing administrative procedures. Having unsuccessfully pressed these arguments at the trial level, the Board now reasserts them here. However, for the reasons detailed below, we find them insufficient to persuade us that the District Judges abused their discretion in granting preliminary injunctive relief. We hold that the Freedom of Information Act does confer jurisdiction on the District Courts to enjoin administrative proceedings pending a judicial determination of the

Court without reaching the merits since the order was interlocutory in nature and had not been certified for appeal by the District Judge. See 28 U.S.C. § 1292(b) (1970).

applicability of the Information Act to documents involved in those proceedings. We further hold that the exhaustion doctrine poses no obstacle to issuance of such an injunction in a proper case. It follows that all three decisions appealed from must be affirmed.

I. THE RENEGOTIATION ACT

Before evaluating the competing contentions of the parties in any detail, it is first necessary to understand the general contours of the Renegotiation Act and the procedural context in which each of these suits arises. The Renegotiation Act vests broad powers in the Renegotiation Board to eliminate excessive profits^{*} secured by contractors and subcontractors engaged in the "national defense program." *See* 50 U.S.C. App. § 1211. The Board exercises these powers by requiring every contractor or subcontractor subject to the Act to file a "Standard Form of Contractor's Report" containing detailed financial information. *See* 50 U.S.C.A. App. § 1215(e)(1) (1972 pocket part); 32 C.F.R. § 1470.3(a) (1972). On the basis of this information, the Board makes an initial

^{*} While the Act nowhere defines the term "excessive profits" beyond the conclusory statement that "[t]he term 'excessive profits' means the portion of the profits derived from contracts . . . which is determined in accordance with this title . . . to be excessive," 50 U.S.C. App. § 1213(e), it does set forth, albeit in rather general terms, a series of criteria which the Board is required to consider in determining the reasonableness of profits. *See* 50 U.S.C. App. § 1213(e)(1)-(6). Perhaps unavoidably, the Board's regulations do little to narrow the extremely broad discretion with which the Act vests the Board in the first instance. *See* 32 C.F.R. § 1460.8 (1972). ("Reasonable profits will be determined in every case by overall evaluation of the particular factors present and not by the application of any fixed formula with respect to rate of profit, or otherwise.")

determination as to whether the particular contract should be subject to renegotiation. If the Board decides to proceed, the case is referred to one of the Regional Renegotiation Boards which examines the Standard Form of Contractor's Report and gathers any additional information needed. Personnel employed by the Regional Board then prepare a "Report of Renegotiation" which includes a "recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." 32 C.F.R. § 1472.3(d) (1972).

Upon receipt of the "Report of Renegotiation" the Regional Board examines the data *de novo* and makes its own tentative determination as to the amount of excess profits. 32 C.F.R. § 1472.3(e). A conference is then held between the contractor and the regional personnel assigned to the case, at which the contractor is informed of the tentative determination and given an opportunity to present additional data and arguments. At the conclusion of the conference the contractor may either agree to the tentative determination or proceed to the next step. If he elects to contest the tentative determination, a second conference is arranged with a panel of the Regional Board. The panel hears any additional arguments the contractor may wish to make, and then submits its recommendation for a final disposition to the Regional Board—a recommendation which may be for a greater or lesser liability than that contained in the tentative determination. See 32 C.F.R. § 1472.3(f), (h) & (i). Thereupon the Regional Board makes a final recommendation which, again, may be "greater than, equal to or less than" the tentative determination. 32 C.F.R. § 1472.3(i).

If the contractor is still dissatisfied, he then has recourse to the Renegotiation Board itself. Upon taking

such an appeal, the contractor has his case assigned to a division of the Board which is not "bound or limited in any manner by any evaluation, recommendation or determination of the Regional Board." 32 C.F.R. § 1472.4(b). The division studies the case *de novo* still another time and makes a recommendation to the Renegotiation Board. The Board then makes a final determination which, characteristically, "may be in an amount greater than, equal to, or less than" the prior determinations. 32 C.F.R. § 1472.4(d).

The term "final determination" is something of a misnomer, however, since even at this stage the renegotiation process continues. The Board proceeds to negotiate with the contractor in an effort to secure his voluntary agreement. Only if this effort fails does the Board enter a final order determining the amount of excess profits. 32 C.F.R. § 1472.4(d). This order brings the administrative process to a conclusion, but it still does not exhaust the contractor's remedies. An appeal of right lies to the United States Court of Claims which is explicitly directed to ignore all that has occurred before and to redetermine *de novo* the amount, if any, of excess profits. See 50 U.S.C.A. App. § 1218 (1972 pocket part). The Court of Claims decision is reviewable in the Supreme Court by writ of *certiorari*. 50 U.S.C.A. App. § 1218a (1972 pocket part).

At first blush this labyrinthine system of conferences, recommendations and seemingly endless *de novo* reviews may appear exceedingly wasteful. Upon closer examination, however, it becomes apparent that the Board's bureaucratic structure is carefully attuned to its statutory purpose. The Act's legislative history, as well as the Board's very name, make clear that Congress preferred negotiation to confrontation. Indeed, the Act itself requires the Board to "endeavor

to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits." 50 U.S.C.A. App. § 1215(a) (1972 pocket part). The Board's elaborate system of review is what provides the incentive for the contractor to reach such an agreement. To be sure, the adamant contractor is free to stand on his legal rights and pursue the statutory route all the way to the Court of Claims, and beyond. But such a course entails considerable risk, since the *de novo* nature of each review means that the contractor's liability may well be increased if he pursues his remedies to the next rung of the bureaucratic ladder. Moreover, this risk bulks still larger when one considers the extremely vague standards which the Board uses to measure excessive profits. See note 3 *supra*. Given the dangers and uncertainty inherent in pursuing administrative appeals to their conclusion, it is hardly surprising that most contractors reach quasi-voluntary agreements at the lower and middle levels of the bureaucracy.*

These observations lead, in turn, to a paradox which has important implications for our decision in these cases. Although the recommendations made by the lower bureaucratic levels are in no sense final or formally coercive, they are nonetheless exceedingly important to the contractor. Indeed, their importance derives from their non-finality, since it is the possibility that they will be reversed and increased which provides the incentive to accept them without resort to theoretically available *de novo* appeals.

Thus appellees in these cases freely concede that they are still at the beginning of the administrative

* Thus, according to Board figures, approximately 88% of its cases are ended by voluntary agreement, while coercive orders are entered in only the remaining 12%. FIFTEENTH ANNUAL REPORT OF THE RENEGOTIATION BOARD 13 (1970).

process and that, if the preliminary injunction were lifted, the initial unfavorable determination might well be reversed. In No. 24,778 the Eastern Regional Board has made a tentative determination that Astro Communications Laboratory owed the Government \$225,000 for the year under review. Astro had held a conference with the Eastern Regional Board personnel assigned to the case and a meeting with a panel of the Regional Board had been scheduled when the District Court's injunction brought the process to a halt. In No. 24,685 the Eastern Regional Board had already made a final determination that Bannercraft Clothing Company owed \$1,400,000 for excessive profits in 1967 before the District Court intervened. Bannercraft appealed this decision to the Renegotiation Board which, after meeting with the contractor, announced its determination that the company owed \$175,000 for 1966 and \$1,450,000 for 1967. Bannercraft then obtained an injunction aborting the final stages of negotiation required before the Board can issue a binding order. Finally, in No. 71-1025 the David B. Lilly Company has been informed by personnel of the Eastern Regional Board that they would recommend to the Regional Board an assessment against the company of \$700,000 for excess profits realized in fiscal 1967. The District Court granted a preliminary injunction before Lilly had decided whether to exercise its right to a conference with a panel of the Regional Board.

Clearly, then, in all three cases the administrative remedies are not yet exhausted. Even in No. 24,685, which is farthest advanced, Bannercraft still has a final opportunity to negotiate a lower settlement with the Board, followed by a complete *de novo* reexamination of the case in the Court of Claims and possible review in the Supreme Court. But although ap-

pellees concede that their liability may be reduced or eliminated, rather than increased, at a later stage of the administrative process, they nonetheless insist that they need documents in the Board's possession to decide whether to risk further review. These documents, appellees contend, would reveal the strength of the Board's case against them and the facts on which the Board relies in assessing liability. Without them, meaningful negotiation as envisioned by the statute becomes difficult or impossible.

From this perspective, the availability of later administrative relief is largely irrelevant. Appellees claim that they need the documents now so they can take part in the vital negotiating process presently under way. Future *de novo* review, they say, cannot compensate for present ignorance, especially when that ignorance could have an important bearing on intermediary decisions which as a practical matter may end the dispute.

Of course, the mere fact that appellees need present access to the documents does not mean that District Courts are entitled to enjoin ongoing proceedings until their status is decided. Even a forceful demonstration of pending irreparable injury will not support an injunction if the trial court has no jurisdiction to issue it or if the exhaustion doctrine makes its issuance premature. The existence of present need for judicial intervention does have a bearing on both jurisdiction and exhaustion, however, and appellees' demonstration of such a need must be kept in mind when these issues, to which we now turn, are examined.

II. JURISDICTION

The threshold issue in each of these cases is whether anything in the Freedom of Information Act confers jurisdiction on the District Courts to enjoin ongoing administrative proceedings while the question of whether to require production of disputed documents is *sub judice*. Certainly the Board is correct when it points out that nothing in the Act explicitly confers such jurisdiction. While the statute states that "the district court of the United States * * * has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld," 5 U.S.C. § 552(a)(3), it does not in terms confer jurisdiction to enjoin agency proceedings until the records are produced or until their status is decided. Moreover, the Board argues, the legislative history of the Freedom of Information Act makes plain that Congress harbored no such intent. Both the House and Senate Reports indicate that when Congress passed the bill it was mainly concerned with providing information to the press and to the public generally rather than to parties in the middle of administrative litigation.⁵ The

⁵ See, e.g., Senate Report No. 813, 89th Cong., 1st Sess., 3 (1965) (hereinafter cited as "Senate Report"):

"Although the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information. Many witnesses have testified that the present public information section of the Administrative Procedure Act has been used more as an excuse for withholding than as a disclosure statute."

See also House Report No. 1497, 89th Cong., 2d Sess., 2-3 (1966) (hereinafter cited as "House Report").

main thrust of the Act is away from the notion that public records should be available only to those who demonstrate a specialized need for them and toward a system of universal access.* *See, e.g.,* K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.4 (1970 Supp.); *Getman v. NLRB*, — U.S.App.D.C.—, —, 450 F.2d 670, 679 (1971). It would therefore be ironic indeed, the Board contends, if the statute were interpreted to authorize equitable intervention on the basis of specialized need. *Cf. Sears, Roebuck & Co. v. NLRB*, 6 Cir., 433 F.2d 210, 211 (1970).

But although it is undeniably true that Congress was principally interested in opening administrative processes to the scrutiny of the press and general public when it passed the Information Act, the Board interprets the congressional intent too narrowly when it insists this was the only purpose the Act was designed to serve. As the Act's history makes clear, Congress was also troubled by the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information. For example, as the Senate Report explains:

"Requiring the agencies to keep a current index of their orders, opinions, etc., is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change *will prevent a citizen from losing a controversy with an agency* because of some obscure and hidden order or opinion which the agency knows about but which has been un-

* Thus, whereas the old § 3 of the Administrative Procedure Act required a person requesting disclosure to show that he was "properly and directly concerned," the Freedom of Information Act mandates disclosure to "any person." *Compare* 5 U.S.C. § 1002(c) (1964) *with* 5 U.S.C. § 552(a) (3) (1970).

available to the citizen simply because he had no way in which to discover it. * * *

Senate Report at 7. (Emphasis added.) See also House Report at 8. Cf. 5 U.S.C. § 552(a)(2):

"* * * A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

* * *

"(i) it has been * * * made available or published as provided by this paragraph * * *."

When this subsidiary statutory purpose is kept in mind, the possibility that Congress intended to authorize injunctions against pending administrative proceedings until secret records are revealed or their status determined seems less unlikely.

Nor is the fact that the Act nowhere in terms authorizes such injunctions fatal to appellees' case. It must be remembered that Congress does not legislate in a vacuum. Rather, "the governing statutes have been enacted in the context of a body of general concepts developed and developing which define the appropriate relation of agencies and courts." L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 426 (1965). Historically, courts sitting in equity have had broad powers to do justice and avoid irreparable injury, and when Congress confers equitable jurisdiction upon a court, it is reasonable to assume that the legislature is aware of this tradition.

"* * * When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the

statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to * * * give effect to the policy of the legislature.' *Clark v. Smith*, 13 Pet. 195, 203. * * *

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-292 (1960). See also *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

Among the oldest of equity's powers is the inherent authority to preserve the *status quo* pending a judicial review of the merits.

"No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. * * *

Scripps-Howard Radio v. FCC, 316 U.S. 4, 9 (1942). Nor have the courts been troubled by applying this rule to stays of pending administrative actions. See, e.g., *Murray v. Kunzing*, — U.S.App.D.C. —, — F. 2d — (No. 71-1586, decided February 29, 1972). See generally L. JAFFE, *supra*, at 687-708. Although the rule has been variously justified as part of an equity court's "traditional equipment for the administration of justice," *Scripps-Howard Radio v. FCC*, *supra*, 316 U.S. at 9-10, or as stemming from power conferred by the All Writs Act, *Application of President & Directors of Georgetown College, Inc.*, 118 U.S. App.D.C. 80, 84-86, 331 F. 2d 1000, 1004-1006 (1964), it has never been thought that the power must be embodied in a specific statute. On the contrary, the usual presumption is that "if Congress had intended to

make * * * a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co. v. Bowles*, *supra*, 321 U.S. at 329. *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946).

Our opinion in this regard is unchanged by the decisions of this and other courts holding that the Freedom of Information Act does not permit a court to balance the equities before ordering release of records within the Act's ambit. *See Getman v. NLRB*, *supra*, — U.S. App. D.C. at — —, 450 F. 2d at 679-680; *Soucie v. David*, — U.S. App. D.C. — —, — —, 448 F. 2d 1067, 1976-1077 (1971); *Wellford v. Hardin*, 4 Cir., 444 F. 2d 21 (1971). *But see* K. DAVIS, *supra*, § 3A.6 (1970 Supp.); *General Services Administration v. Benson*, 9 Cir., 415 F. 2d 878, 880 (1969). Our refusal to balance the equities in ordering production of records is based upon Congress' explicit rejection of need as a standard for disclosure, *see* text at note 6 *supra*, and its clearly stated command that *all* documents must be disclosed except those mentioned in specific, narrowly drawn exceptions. "Since judicial use of traditional equitable principles to prevent disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to deny relief on equitable grounds apart from the exemptions in the Act itself." *Soucie v. David*, *supra*, — U.S. App. D.C. at — —, 448 F. 2d at 1077.

It hardly follows, however, that Congress intended to withhold any of the usual weapons in the arsenal of equity which ensure conformance to the legislative will. It is one thing to say that Congress has decided for itself which kinds of documents should be disclosed, leaving little if any discretion for the courts.

It is quite another to suggest that Congress has deliberately withheld the tools necessary for courts to implement its substantive decisions. Since temporary stays of pending administrative procedures may be necessary on occasion to enforce the policy of the Freedom of Information Act, we hold that the District Court has jurisdiction to issue such stays. *Cf. Bristol-Myers Co. v. FTC*, 138 U.S. App. D.C. 22, 424 F. 2d 935 (1970).

III. EXHAUSTION

Of course, the bare existence of jurisdiction does not mean that appellees were entitled to the relief they were granted by the District Court. There is more to winning a lawsuit than demonstrating that the court possesses the naked power to act. The plaintiff must also show that the case has reached a posture in which judicial intervention would be effective and appropriate. At least since *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), this showing has included a demonstration that available administrative remedies have been exhausted. While the exhaustion doctrine is occasionally referred to in a loose sense as "jurisdictional," it should not be confused with the type of jurisdictional question discussed above. Jurisdiction, as the term is properly used, goes to the power of the court to act; exhaustion, on the other hand, goes to the timing of the action. Whereas a jurisdictional bar is, in most cases, absolute, the exhaustion requirement, like the related abstention and ripeness doctrines, is subject to the sound discretion of the court. *See, e.g., Sohm v. Fowler*, 124 U.S. App. D.C. 382, 385, 365 F. 2d 915, 918 (1966).

In a recent Freedom of Information Act case, this court intimated that the exhaustion doctrine would not prevent equitable intervention in a pending adminis-

trative proceeding while the status of contested documents was litigated. See *Bristol-Myers Co. v. FTC*, *supra*, 138 U.S. App. D.C. at 27, 424, F.2d at 940. Appellant now urges us to reject this dicta. It cites to us three cases, not involving the Freedom of Information Act, in which the Supreme Court disapproved premature judicial intervention in the renegotiation process—see *Lichter v. United States*, 334 U.S. 742 (1948); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540 (1946)—and extrapolates from these cases the general rule that it is always improper for a court to interfere with pending administrative proceedings. But as the cases listed in the margin clearly demonstrate, there is simply no such general rule.⁷ To be sure, many other cases can be cited

⁷ A highly abridged listing of cases in which federal courts have reached the merits or stayed administrative proceedings despite the existence of unexhausted administrative remedies follows: *McKart v. United States*, 395 U.S. 185 (1969); *Damico v. California*, 389 U.S. 416 (1967); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Public Utilities Comm'n of California v. United States*, 355 U.S. 534 (1958); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535 (1954); *Robertson v. Chambers*, 341 U.S. 37 (1951); *United States Alkali Export Assn. v. United States*, 325 U.S. 196 (1945); *Public Utilities Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456 (1943); *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56 (1939); *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587 (1926); *United States ex rel. Kansas City Southern Ry Co. v. ICC*, 252 U.S. 178 (1920); *Murray v. Kunsig*, — U.S. App. D.C. —, — F.2d — (No. 71-1586, decided Feb. 29, 1972); *Jewel Companies, Inc. v. FTC*, 7 Cir., 432 F.2d 1155 (1970); *Elmo Division of Drive-X Co. v. Dixon*, 121 U.S. App. D.C. 113, 348 F.2d 342 (1965); *Amos Treat & Co. v. SEC*, 113 U.S. App. D.C. 100, 306 F.2d 260 (1962).

for the proposition that courts on occasion refuse to interfere with pending administrative proceedings.* But this conflict only illustrates the danger inherent in making easy generalizations about the exhaustion doctrine. Professor Davis has put it bluntly: "Despite the many absolute statements in judicial opinions that judicial relief is withheld until administrative remedies have been exhausted, the holdings show that exhaustion is sometimes required, the holdings show that exhaustion is sometimes required and sometimes not. No opinion of the Supreme Court explain the contrariety of holdings * * *." 3 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 20.10 (1958).

No doubt much of this confusion stems from the fact that exhaustion is not really a coherent doctrine at all. Rather, the exhaustion label uneasily unites a number of quite disparate policy considerations which sometimes work at cross purposes and always require individual examination. As the Supreme Court has made clear, "The doctrine is applied in a number of different situations and is, like most judicial doctrines, subject to numerous exceptions. Application of the doctrine to specific cases requires an understanding of its purposes and of the particular administra-

* See, e.g., *Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209 (1938); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Sterling Drug Inc. v. FTC*, *supra* note 1; *Frito-Lay, Inc. v. FTC*, 5 Cir., 380 F.2d 8 (1967); *Sohn v. Fowler*, 124 U.S. App. D.C. 382, 365 F.2d 915 (1966); *Lone Star Cement Corp. v. FTC*, 9 Cir., 339 F.2d 505 (1964); *Chicago Automobile Trade Assn v. Madden*, 7 Cir., 328 F.2d 766 (1964); *SEC v. R. A. Holman & Co., Inc.*, 116 U.S. App. D.C. 275, 323 F.2d 284, *cert. denied*, 375 U.S. 943 (1963); *Texaco, Inc. v. FTC*, 5 Cir, 301 F.2d 662, *cert. denied*, 371 U.S. 822 (1962); *Virginia Petroleum Jobbers Assn v. FPC*, 104 U.S. App. D.C. 106, 259 F.2d 921 (1958).

tive scheme involved." *McKart v. United States*, 395 U.S. 185, 193 (1969).

When the exhaustion doctrine is broken down into its component parts, the task of making sense out of the many cases becomes considerably less formidable. Moreover, when the purposes of the doctrine are individually measured against the facts of these cases, it is plain that no legitimate judicial policy would be served by depriving these appellees of the relief they seek. Since exhaustion here would serve no purpose, it follows that the District Judges acted within their discretion and that their decisions should not be disturbed.

A. IRREPARABLE INJURY

The first purpose served by the exhaustion doctrine stems not so much from the law of administrative agencies as from general equity jurisprudence. A party seeking equitable relief must always show that he would suffer some sort of irreparable injury without it. *See, e.g., Petroleum Exploration, Inc. v. Public Service Comm'n*, 304 U.S. 209, 222 (1938). Moreover, the usual expense and annoyance which accompany vindication of a right through normal legal channels is not the sort of irreparable injury of which equity generally takes cognizance. *See, e.g., Myers v. Bethlehem Shipbuilding Corp., supra*, 303 U.S. at 51-52. *Cf. Douglas v. City of Jeannette*, 319 U.S. 157, 163 (1943). Thus under normal circumstances a party who must undergo an administrative proceeding does not, by that fact alone, suffer sufficient injury to trigger equitable intervention. *See Virginia Petroleum Jobbers Assn v. FPC*, 104 U.S.App.D.C. 106, 110, 259 F.2d 921, 925 (1958).

It does not follow, however, that the harm stemming from pending administrative proceedings can

never be so great as to be "irreparable." Cf. *Dombrowski v. Pfister*, 380 U.S. 479 (1965). If the expenses incident to the administrative litigation are extraordinary, equitable relief may be appropriate. See *Public Utilities Comm'n of Ohio v. United Fuel Gas Co.*, 317 U.S. 456, 469 (1943). Similarly, if the administrative proceeding is too protracted, equity may intervene. See *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591 (1926). And, of course, if an administrative body threatens invasion of important substantive rights, an equity court need not stand helplessly by until the damage has been done. See *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U.S. 56 (1939). Cf. *National Student Assn v. Hershey*, 134 U.S.App.D.C. 56, 412 F.2d 1103 (1969).

In our view, appellees in these cases have demonstrated an impending injury which is different in kind from that inevitably associated with any administrative proceeding. As demonstrated in Part I *supra*, the contractors assert a need for the disputed documents in order to engage in the sort of informed negotiation with the Board which Congress intended. They also seek access to information which will help them decide whether to accept the Board's latest offer or pursue further channels of review, thereby risking imposition of a larger penalty. It is senseless to say that the injuries they will suffer if not given the documents are merely incidental to the administrative process. Appellees' point is that the administrative process cannot function as it was intended to function until they are given access to the documents. Thus these cases are quite different from cases where parties have complained that administrative procedures are themselves burdensome. Our appellees would like to take advantage of renegotiation process, but claim an inability to do so effectively until

the Board complies with the Freedom of Information Act. If these facts are true, and it is for the trial court to determine in the first instance whether they are true or not, then appellees have demonstrated the sort of clear threat to a statutory right which can easily be categorized as an impending irreparable injury.

B. NO ADEQUATE REMEDY AT LAW

Closely allied to the irreparable injury requirement is a second doctrine, again stemming from general equity jurisprudence, which requires a demonstration of no adequate remedy at law.* Under normal circumstances, a party aggrieved at some early stage of the administrative process can secure relief through normal administrative channels. So long as such relief is available, it cannot be said that his remedy at law is inadequate and, hence, equity will not intervene. See, e.g., *Aircraft & Diesel Corp. v. Hirsch*, *supra*, 331 U.S. at 778. Thus courts have frequently refused to interfere with pending administrative proceedings on the ground that the aggrieved party "has an adequate remedy within the four corners of the Act * * *," *Virginia Petroleum Jobbers Assn v FPC*, *supra*, 104 U.S. App.D.C. at 109, 259 F.2d at 924, or because any "error may be reviewed and corrected in the event that the respondent below is finally required to cease and desist from the challenged method of

* In one sense, of course, the inadequate remedy requirement is indistinguishable from the irreparable injury requirement. The very thing which makes an injury "irreparable" is the fact that no remedy exists to repair it. As used above, however, the irreparable injury rubric is intended to describe the quality or severity of the harm necessary to trigger equitable intervention. In contrast, the inadequate remedy test looks to the possibilities of alternative modes of relief, however serious the initial injury.

competition or practice." *Texaco, Inc. v. FTC*, 5 Cir., 301 F.2d 662, 663 (1962). As the Fifth Circuit explained in the context of Federal Trade Commission proceedings:

"Jurisdiction" to review proceedings conducted by the Federal Trade Commission pursuant to Section 7 of the Clayton Act * * * is conferred upon the Court of Appeals by Section 11(c) of the Act * * *. Section 11(d) * * * makes that jurisdiction exclusive. All constitutional, jurisdictional, substantive, and procedural issues arising in Commission proceedings may be considered in a Section 11(c) appeal * * * and this statutory right to review has long been viewed as constituting a speedy and adequate remedy at law. * * *"

Frito-Lay, Inc. v. FTC, 5 Cir., 380 F.2d 8, 9-10 (1967).

But while this rule is obviously sound, it is equally obvious that it has no relevance to these cases. In the first place, even if we assume for the moment that there is a remedy for Freedom of Information Act violations "within the four corners" of the Renegotiation Act, that remedy will not prevent the irreparable injury which the contractors fear. Because the statutory review procedures are all *de novo*, the review will be geared to a determination of whether in fact appellees realized excess profits. Clearly the reviewing bodies will not consider whether the contractors could have negotiated better settlements at a lower level if they had had access to the disputed documents. Nor will these bodies consider the possibility that if the documents had been made available appellees might not have appealed at all and thus not risked imposition of more extensive liability.

These cases are similar to *Elmo Divisions of Drive-X Co. v. Dixon*, 121 U.S. App. D.C. 113, 115, 348 F. 2d 342, 344 (1965), in that "[t]he type of procedural error [appellees] assert[] is not of a kind which affects the [Board's] substantive findings; no one suggests that the [Board's] * * * procedure is *unreliable* as a fact-finding mechanism." (Emphasis in original.) In that case we held that "[t]he prospect of ultimate appellate review of any final order issuing out of the * * * complaint proceeding is not adequate." *Ibid.* Similarly, it should be apparent here that if the contractors are to be granted relief at all they must have it now before the administrative momentum carries their cases beyond the point where the harm can be undone. If we take Congress' declaration of purpose seriously, then the parties are supposed to *negotiate* over excess profits at the lower administrative levels. The seemingly endless *de novo* reviews were intended to make the negotiating process work, not to provide a substitute for negotiation. If the negotiating process fails to occur, the opportunity is lost forever. To say that compulsory awards imposed by the Board or the Court of Claims at the end of the process provide an adequate remedy is to ignore the difference between an agreement freely arrived at, as preferred by Congress, and a judgment imposed by a court of law.

Moreover, assuming *arguendo* that the damage could somehow be undone at a later stage of the proceedings, it is still far from clear that the Renegotiation Board or the Court of Claims has jurisdiction to afford the necessary relief. The Fifth Circuit could require exhaustion in *Frito-Lay, Inc. v. FTC*, *supra*, because the Clayton Act vested full power in the Court of Appeals to correct any errors made by the Commission. But the Renegotiation Act vests no power in the Court

of Claims to correct errors made under the Freedom of Information Act. The Information Act confers jurisdiction on the *District Court* to order production of appropriate documents, and there is no reason to assume that this jurisdiction was not intended to be exclusive. See K. DAVIS, *supra*, § 3A.27 (1970 Supp.). But cf. *Polymers, Inc. v. NLRB*, 2 Cir., 414 F. 2d 999, 1006 (1969). Certainly it cannot be said that Congress intended the Board to enforce the Information Act against itself when one remembers that the main purpose of the Act was to provide a disinterested forum to assess the discoverability of agency records. See Senate Report at 3; House Report at 2.

It is this argument, among others,¹⁰ which distinguishes this case from the superficially similar fact pattern presented in *Sterling Drug Inc. v. FTC*, — U.S.App.D.C. —, 450 F.2d 698 (1971). In *Sterling Drug*, as in these cases, a party before an agency

¹⁰ *Sterling Drug* can also be distinguished on the ground that in that case a delay in assumption of jurisdiction was necessary to avoid decision on a possibly difficult constitutional question. If at some later stage of the *Sterling Drug* case the Commission had ruled for the company on statutory grounds, the procedural due process question might have been permanently avoided. Cf. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 772 (1947); *Sohm v. Fowler*, *supra* note 8, 194 U.S.App.D.C. at 385, 365 F.2d at 918. There is no analogous maxim which requires courts to avoid questions concerning the Freedom of Information Act, however. On the contrary, the Act directs the District Court to decide questions arising under it as quickly as possible. See 5 U.S.C. § 552(a)(3). Nor, in any event, could this question be avoided by following the administrative process to go forward. Since the Freedom of Information Act guarantees access to documents regardless of need, see text at note 6 *supra*, appellees would be entitled to a judicial declaration as to the status of these documents even if they prevailed before the Renegotiation Board without them.

sought production of documents under the Freedom of Information Act and the due process clause of the Constitution. But as Judge Tamm's opinion makes clear, the drug company sought to enjoin further agency hearings only under the theory that such hearings, without production of requested documents, would constitute a denial of due process.¹¹ The court

¹¹ Thus in the section of its opinion entitled "*Sterling's Claim Under the Freedom of Information Act*," the court makes no reference to possible exhaustion problems and proceeds to decide Sterling's claims on the merits. See ——— U.S. App.D.C. at ———, 450 F.2d at 703-710. It is only when the court comes to the section dealing with "*Sterling's Claim of Denial of a Fair Hearing*" that the effort to enjoin the Commission is discussed. See ——— U.S.App.D.C. at ——— 450 F.2d at 710-712.

At the same time, however, Judge Tamm pointed out that "[i]n applying these [exhaustion] principles in cases involving interlocutory appeals from agency action, the courts appear to have formulated the general rule that a party may bypass established avenues for review within the agency * * * where the issue in question cannot be raised from a later order of the agency * * *." ——— U.S. App.D.C. at ———, 450 F.2d at 710. That, of course, is our case. Since a violation of the Freedom of Information Act can only be asserted in a collateral District Court action, it is pointless to remand appellees to their administrative remedies. The plain fact is that there are no administrative remedies under the Freedom of Information Act. Once a party has properly requested information from an agency, he has exhausted all the administrative avenues of relief which the Act provides. His only remaining remedy is an action in United States District Court—the very mode of relief which our appellees sought and which the Board now attempts to frustrate by pointing to other "remedies" which do not exist and which would not provide adequate relief if they did exist. Cf. *United States Alkali Export Assn v. United States*, 325 U.S. 196, 210 (1945).

Equity, of course, will not require performance of a useless act, and by the same token, exhaustion has never been thought

properly rejected this argument, holding that if the company utilized the normal review procedure any denials of due process could be corrected by a reviewing court or by the agency itself. Since this procedure constituted an adequate remedy at law, equitable intervention was improper.

C. RESPECT FOR ADMINISTRATIVE JURISDICTION

As the discussion above should make clear, a good part of the exhaustion doctrine involves no more than a specialized application of the traditional tenets of equity. It would be a mistake, however, to assume that the exhaustion doctrine has no independent existence. There is another set of principles encompassed within the exhaustion rule which is special to administrative law and has no precise analogue in general equity practice. As the Supreme Court has recently explained:

“ * * * [T]he most common application of the exhaustion doctrine is in cases where the relevant statute provides that certain administrative procedures shall be exclusive. * * * The reasons for making such procedures exclusive, and for the judicial application of the exhaustion doctrine in cases where the statutory requirement of exclusivity is not so explicit, are not difficult to understand. A primary purpose

to require parties to be “buffeted from ‘pillar to post’ in a vain search for a tribunal that can vouchsafe to them their rights.” *Randolph v. Missouri-Kansas-Texas R. Co.*, W.D. Mo., 85 F.Supp. 846, 847 (1949); *affirmed*, 8 Cir., 182 F.2d 996 (1950). Since appellees will not be able to assert a Freedom of Information Act violation on appeal from the Renegotiation Board decision, they must assert it now if they are to do so at all. It follows that their remedy at law is inadequate and that the traditional prerequisites for equitable intervention have been satisfied.

is, of course, the avoidance of premature interruption of the administrative process. The agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. And of course it is generally more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages. * * *

McKart v. United States, *supra*, 395 U.S. at 193.

Exhaustion, then, is in part a doctrine of comity. But whereas all the limitations on equity have their ultimate roots in comity, the exhaustion requirement gains added force from the specific congressional command that certain questions be decided in the first instance by agencies rather than by courts. It was this command which the Supreme Court noted and primarily relied upon when it rejected premature review of Renegotiation Board decisions a quarter of a century ago. Thus "[t]he legislative history of the Renegotiation Act * * * shows that Congress intended the Tax Court [now the Court of Claims] to have exclusive jurisdiction to decide questions of fact and law * * *. In order to grant the injunction sought the District Court would have to decide this issue in the first instance. Whether it ever can do so or not, it cannot now decide questions of coverage when the administrative agencies authorized to do so have not yet made their determination." *Macauley v. Waterman Steamship Corp.*, *supra*, 327 U.S. at 544. See also *Lichter v. United States*, *supra*, 334 U.S. at

792; *Aircraft & Diesel Equipment Corp. v. Hirsch, supra*, 331 U.S. at 775. The general equitable principles discussed above were recognized, but they were buttressed with additional arguments deriving from Congress' unquestioned power to assign primary jurisdiction over certain matters to administrative agencies.

"Whatever may be the scope allowed generally for equity to intervene upon the ground of inadequacy of legal remedies, where no explicit congressional command exists for following a prescribed procedure, the problem when such a mandate is present is entirely different from one tendered in its absence. The very fact that Congress has made the direction must be cast into the scales as against the factors which, without that fact, would or might be of sufficient weight to turn the balance in favor of allowing utilization of equity's resources. * * *

Aircraft & Diesel Equipment Corp. v. Hirsch, supra, 331 U.S. at 774-775.

But although the agencies must be granted broad deference when they act within their congressionally assigned roles, it hardly follows that they are due such deference when they exceed the bounds of their proper jurisdiction. The Supreme Court has therefore stated that it will not require exhaustion when a party alleges that "there is no properly authorized administrative procedure for it to exhaust and that the administrative authorities who seek to determine its case have no lawful right to do so." *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 540 (1964). It must be conceded that, as formulated, this principle is overly broad and cannot be reconciled with all the cases. See 3 K. DAVIS, *supra*, § 20.02, at 65-66. As the Court made clear early on:

"* * * [T]he rule requiring exhaustion of the administrative remedy cannot be circum-

vented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact."

Myers v. Bethlehem Shipbuilding Corp., *supra*, 303 U.S. at 51-52. But although exhaustion may not be avoided by the mere assertion that an agency is operating *ultra vires*, courts have frequently excused parties from exhausting remedies when an agency appears on the face of the record to be exceeding its proper authority. *See, e.g., Oestereich v. Selective Service System*, 393 U.S. 233 (1968); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Leedom v. Kyne*, 358 U.S. 184 (1958).

What makes our cases unique is the fact that here the Board's lack of authority to enforce the Freedom of Information Act is not only clear from the face of the record; it is entirely uncontested. The Act in terms confers jurisdiction to enforce its provisions on the United States District Court alone, and we do not understand the Board to argue otherwise. *See text at note 11 supra*. Obviously, then, these cases fall within the *Grand Central* rule. If ever there is a case where "there is no properly authorized administrative procedure * * * to exhaust," then surely this is it.

It should be equally obvious that the *Waterman—Aircraft—Lichter* line of cases is totally inapposite. Appellees are not attempting to wrest from the Board authority which Congress has properly delegated to it. They do not ask the court to resolve questions as to the extent of their liability or susceptibility to renegotiation—questions which the Board should answer in

the first instance. Rather, appellees seek determination of a question over which the Board plainly lacks jurisdiction—*viz.*, the discoverability of documents under the Freedom of Information Act. True, appellees would have the court suspend renegotiation until that question can be answered. But that suspension does not change the ultimate power of the Board to decide all questions within its jurisdiction in the first instance. *Cf. Murray v. Kunzig, supra.* Our appellees, like the appellant in *Elmo Division of Drive-X Co. v. Dixon, supra*, object “not to the fact of the [Board’s] making an initial substantive determination but rather to the process by which it has chosen to do so.” 121 U.S. App. D.C. at 115, 348 F.2d at 344. The preliminary injunctions granted by the District Court merely ensure that the negotiating process will operate as Congress intended it to operate and that the policy of the Freedom of Information Act will be respected.

IV. CONCLUSION

We are not, of course, unmindful of the delay which judicial intervention in the renegotiation process might cause and of the Government’s legitimate interest in speedily recovery funds which rightfully belong to it.¹² Contractors have a right to inspect documents covered by the Freedom of Information Act,

¹² We note in this regard that the Renegotiation Act places a 2-year time limit on the renegotiation process, and that if a final order is not entered within that time the contractor’s liability is discharged. *See* 50 U.S.C.A.App. § 1215(c) (1972 pocket part). In these cases the contractors agreed to suspend the 2-year limitation while their Freedom of Information Act claims were *sub judice*. In the future the District Court should, when appropriate, condition granting of a preliminary injunction on the contractor’s willingness to agree to a similar suspension.

but they have no right to delay recovery of public monies indefinitely while they endlessly litigate collateral issues.

But in fact it seems likely that the delay incident to assertion of most claims under the Information Act will be insubstantial. It should be remembered that these are test cases and that the meticulous briefing and detailed argument which has slowed their movement through the courts is unlikely to be repeated. Generally, it should be unnecessary to enjoin Board proceedings for more than the few days it takes the trial judge to inspect the documents *in camera* and reach a decision as to their status. And it should be noted that the Act itself directs the District Court to give precedence to Freedom of Information Act claims and set them for trial "at the earliest practicable date." 5 U.S.C. § 552(a)(3).

Moreover, if an Information Act claim does promise to delay substantially Board proceedings, the District Court is certainly authorized to take that fact into account when it exercises its discretion. One of the factors which an equity court must consider when deciding whether to issue a preliminary injunction is the public interest, and the public interest in speedy completion of contract renegotiations is not to be doubted. All we hold today is that the hypothetical possibility that *some* injunctions against Board proceedings may be improper does not justify a prophylactic rule against *all* such injunctions. "It will be time enough to consider the relief to which the Board is entitled if and when a showing of disruption of Board functions is made." *Getman v. NLRB, supra*, ——— U.S. App.D.C. at ———, 450 F.2d at 675.

Since the District Court properly assumed jurisdiction in these cases and since no abuse of discretion

has been shown, each of the orders appealed from must be affirmed. In order to minimize the delay before the Board occasioned by these proceedings, the District Court should proceed to a decision on the merits forthwith.

Affirmed.

MACKINNON, *Circuit Judge*, dissenting: While I must confess my admiration for the skillfully crafted opinion of the majority, I find imbedded within its seductive virtuosity fundamental errors that compel me to respectfully dissent.

The most serious error of the majority, an error bordering on constitutional dimensions, is the statement at page 10 that:

The existence of present need for judicial intervention does have a bearing on both jurisdiction and exhaustion, however, and appellees' demonstration of such a need must be kept in mind when these issues, to which we now turn, are examined. [Emphasis added.]

That the federal courts are courts of limited jurisdiction is a proposition beyond question. *The Confiscation Cases*, 87 U.S. (20 Wall.) 92 (1874); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850); 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE § 21 (Wright ed. 1960):

While the Constitution of the United States defines the federal judicial power, it does not itself grant such power or any part thereof to the United States District Courts. The jurisdiction of the district courts is therefore determined and limited by Congress. In other words, *the district courts must find their jurisdiction in express provisions of the federal statutes. [Citations omitted, emphasis added.]*

In brief, the appellees "need for judicial intervention" is wholly irrelevant to determination of the ju-

risdiction of the District Courts in these cases. Our sole inquiry should be whether or not Congress conferred upon them jurisdiction to enjoin ongoing administrative proceedings while considering appellees' requests for documents pursuant to the Freedom of Information Act.

The majority concedes that nothing in the Act expressly confers such jurisdiction, nevertheless through inference and analogy they strain to create a jurisdiction which Congress did not consider appropriate to grant. In doing so, the majority ignores another principle of law nearly as venerable as the doctrine of *Sheldon v. Sill*, *supra*. In 1919 Mr. Justice Brandeis noted:

These general rules are well settled: . . . (2)
That, where a statute creates a right and provides a special remedy, that remedy is exclusive.

United States v. Babcock, 250 U.S. 328, 331 (1919), citing *D.R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U.S. 165, 174, 175 (1915); *Arnson v. Murphy*, 109 U.S. 238 (1883); *Barnet v. National Bank*, 98 U.S. 555, 558 (1878); *Farmers & Mechanics Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875). This doctrine remains valid today. See, *Switchmens Union v. National Mediation Board*, 320 U.S. 297 (1943); cf. *Reisman v. Caplin*, 375 U.S. 440, 450 (1964). In the Freedom of Information Act, Congress created in the general public an express right of access to all information of the Federal Government not within one of the statute's exempted categories. See, *Getman v. NLRB*, — U.S.App.D.C. —, 450 F.2d 670 (1971); *Soucie v. David*, 145 U.S.App.D.C. 144, 448 F.2d 1067 (1971); *Wellford v. Hardin*, 444 F.2d 21 (4th Cir. 1971); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 3A.4 (1970 Supp.). To effectuate that

right, Congress provided the specific, narrow, remedies of an injunction against withholding agency records and an affirmative order to produce such records improperly withheld. I would hold, under the doctrine as stated by Mr. Justice Brandeis, that these remedies are exclusive; that no jurisdiction to grant any other remedy was conferred on the District Courts by Congress; and that these District Courts were accordingly without jurisdiction to enjoin the proceedings before the Renegotiation Board.

II

Were I not convinced that the simple rules of law cited in Part I are wholly conclusive on the issue of jurisdiction, I would still fail to be swayed by the tenuous argument of the majority that jurisdiction can properly be implied from the legislative history of this statute.

At pages 11-12 the majority concedes "that Congress was principally interested in opening administrative processes to the scrutiny of the press and general public when it passed the Information Act." However the majority then points to two sentences in the Senate Report, and the subsection of the Act to which they referred, to demonstrate a "subsidiary statutory purpose" to "prevent a citizen from losing a controversy with an agency" because of "secret laws or incomplete information."

To begin, the concern over "incomplete information" is gratuitously added by the majority opinion, for the Senate Report makes it clear that the subsection involved, 5 U.S.C. § 552(a)(2),

deals with agency opinion, orders and rules. . . .

Apart from the exemptions, agencies must make available for public inspection and copying all final opinions (including concurring and

dissenting opinions); all orders made in the adjudication of cases; and those statements of policy and interpretations which have been adopted by the agency and are not required to be published in the Federal Register; and administrative staff manuals and instructions that affect any member of the public.

SEN. REP. No. 813, 89th Cong., 1st Sess. 6-7 (1965).
The House Report contributes this additional explanation:

This material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions.

H.R. REP. No. 1497, 89th Cong., 1st Sess. 7 (1965).
Thus this section of the Act, and the Reports, is solely concerned with the existence of "secret law" rather than any "incomplete information" that might be useful to a citizen involved in controversy with an agency. Furthermore, though publication and indexing of such "secret laws" will inevitably benefit potential litigants, it seems to me that this benefit is incidental to the statute's central purpose of ensuring that such important "case law" of the Federal administrative "bureaucracy" (House Report at 7) will be readily accessible to all members of the public regardless of their special need. In the context of the Act, the evil of "secret law" is its secrecy—the very notion of the Federal Government operating behind closed doors away from public examination and scrutiny—rather than any detrimental impact on potential litigants before the agencies.

I have searched the legislative history of the Act in vain for any other suggestion that Congress had any special interest in or concern with litigants before the

administrative agencies. The entire thrust of that history points to the congressional intent to make all but the specifically exempted information available to any member of the public without requiring any showing of need therefor. In these two sentences from the Senate Report the majority picks too slender a reed on which to support an argument to the contrary. The jurisdiction of the federal courts must rest on more substantial grounds, i.e., "express provisions of the federal statutes." BARRON & HOLTZOFF, *supra*.

III

I am similarly unconvinced that the cases and doctrines cited by analogy in the majority opinion lead to the conclusion that jurisdiction should be found here.

Pointing to the traditionally broad powers of equity, the majority cites three cases for the proposition that when Congress confers equitable jurisdiction upon a court that jurisdiction should be construed to encompass the traditional breadth of the equity power. None of the three cases, however, support so broad a proposition for these cases. In *Mitchell v. Robert De-Mario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960), the Court's expression of this proposition contains an express limitation:

When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief *in light of the statutory purposes*. [Emphasis added.]

The statutory purpose here was limited to providing public access to governmental information *without regard to need*, and the statutory remedies were intended

to aid in the accomplishment of that statutory purpose. The "complete relief" accorded by the majority is relief allegedly made necessary by the *special needs* of the appellees—a basis for relief to which the remedies of the Information Act were not addressed. In such circumstances, litigants with *special needs* constitute a class of persons that the remedies of the Information Act did not intend to accommodate; and the court has no power to expand the Act by judicial fiat to serve a purpose that is beyond "the statutory purposes."

The other two cases, *Hecht Co. v. Bowles*, 321 U.S. 321 (1944) and *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946), both involved the same statute, Section 205(a) of the Emergency Price Control Act of 1942, and the issue of whether equitable remedies other than those specifically stated in the statute could be awarded. The Court in both cases answered that question in the affirmative, but based this finding upon an expansive provision of the statute. The following language from *Porter* is critical:

Indeed, the language of § 205(a) admits of no other conclusion. . . . [I]t expressly authorizes the District Court, upon a proper showing, to grant "a permanent or temporary injunction, restraining order, or other order." As recognized in *Hecht Co. v. Bowles*, *supra*, 328, the term "other order" contemplates a remedy other than that of an injunction or restraining order, a remedy entered in the exercise of the District Court's equitable discretion.

..... This is not a situation where a statute has created a right and has provided a special and exclusive remedy, thereby negating any jurisdiction that might otherwise be asserted. *United States v. Babcock*, 250 U.S. 328.

328 U.S. at 399, 403 (emphasis added). Here, of course, there is no phrase similar to "or other order" that would indicate a congressional intent to make the special remedies of the Act nonexclusive.

The majority's cases supporting "the inherent authority to preserve the *status quo* pending a judicial review of the merits" are also inapposite. All of these cases involve stays of administrative proceedings pending judicial determination of matters preliminarily decided therein. Here, though the appellees intend to use the information they would obtain in this Information Act suit to aid them in their proceedings before the Renegotiation Board, this suit is entirely collateral to those administrative proceedings. The majority has not cited, nor am I aware of, any judicial decision in which a civil suit seeking enforcement of a statutory right wholly independent of and unrelated to any issues involved in an ongoing administrative proceeding has resulted in an order in the course of that litigation staying or otherwise interfering with the agency's proceedings.

Finally, in view of the many cases (cited by the majority at pages 14-15) finding an express congressional intent that equitable considerations should not upset the legislative judgment that all but specifically exempted information must be provided under the Act, I consider that our statement in *Soucie v. David*, *supra*, 145 U.S. App. D.C. at 154, 448 F.2d at 1077, can be appropriately paraphrased as follows:

Since judicial use of traditional equitable principles to *compel* disclosure would upset this legislative resolution of conflicting interests, we are persuaded that Congress did not intend to confer on district courts a general power to *grant* relief on equitable grounds apart from the *specified remedies* in the Act itself.

In this line of cases agencies unsuccessfully sought to withhold information, other than that within the Act's specific exemptions, on the basis of traditional equitable concepts of relative need or hardship. Here, the appellees seek to obtain a remedy, other than those specified in the Act, on the basis of traditional equitable concepts of need or hardship. I see no basis for our treating the two situations differently.

IV

While I believe that these cases should properly have been disposed of on jurisdictional grounds, I also find the majority's disposition of the exhaustion issue to be incorrect. In *Sterling Drug Inc. v. FTC*, — U.S.App.D.C.—, 450 F.2d 698 (1971), Sterling sought the production of documents from the FTC during the course of administrative proceedings challenging their acquisition of another company. The complaint in that suit was framed in two separate, alternative, claims—one under the Information Act seeking the relief specifically provided therein, and the other under the Due Process clause of the Constitution seeking an injunction against continuing the administrative procedures. The same information was sought under both claims, but while we granted the Information Act claim and ordered production of the documents we found that the doctrine of exhaustion of remedies barred an injunction to stay continuance of the administrative proceedings.

The only difference I find between *Sterling Drug* and the present cases is that here the pleadings have been altered to request both forms of relief in the same claim rather than in the alternative. I simply do not consider this difference significant enough, particularly in our procedure under the Federal Rules,

to warrant the dramatically different result the majority has ordered here. Their ingenious attempt to distinguish *Sterling Drug*, on the ground that here the claim to entitlement is based on the Information Act and no administrative remedy exists within the Renegotiation Board's procedures for litigating that claim, is wholly unconvincing. Appellees may not have cast their pleadings in terms of a violation of due process before the agency, but all of their allegations of irreparable injury without adequate legal remedy (which the majority finds determinative on the exhaustion issue) can properly be interpreted only as a complaint that by refusing to provide the requested documents the Board has prejudiced their rights to a fair renegotiation.

By failing to recognize the essentially "due process" nature of the appellees' allegations of injury, the majority have become trapped in a seductive, but incorrect, syllogism that proceeds as follows: (1) Appellees have a nonfrivolous claim of entitlement to the documents under the Information Act; (2) Possession of these documents would significantly enhance appellees' opportunity to negotiate the most favorable possible settlement early in the renegotiation proceedings; (3) The Renegotiation Board is without jurisdiction to consider the claim of entitlement to the documents under the Information Act and will continue the renegotiation proceedings without resolving that claim or providing the documents; *therefore* (4) Having shown a nonfrivolous claim of entitlement to the documents, and an injury caused by the lack of information that cannot be corrected in the administrative proceedings, the Board must be enjoined from proceeding until that claim is resolved. The error in this syllogism is at step two, and is reflected by the majority's acquiescence, at page 19,

in the appellees' contention "that the administrative process cannot function as it was intended to function until they are given access to the documents." This position seriously misconstrues the intended functioning of the Renegotiation Board's procedures—controlled access to information concerning the Government's position in the negotiations plays a significant role in the administrative process before the Board.

The majority correctly notes in their review of the Renegotiation Act, at page 7, that "[t]he Act's legislative history . . . make[s] clear that Congress preferred negotiation to confrontation." Indeed, Congress explicitly omitted the trappings of formal procedural due process, with its opportunities for discovery of evidence and confrontation of adverse parties, from the Board's procedures. *Lichter v. United States*, 334 U.S. 742, 791-92 (1948). But while noting these facts, the majority seems to ignore one of the critical aspects of negotiation that sets it apart from litigation as a device for resolving disputes: the skillful negotiator carefully guards and controls his adversary's access to the critical bits of information that would reveal the strengths or weaknesses of his bargaining position.

The regulations describing the Board's procedures reflect this characteristic approach to the release of information in negotiation. Indeed, the "seemingly endless *de novo* reviews" that the majority consider are intended to coerce settlement at lower levels of the administrative machinery by making appeals more risky, instead reflect the recognition that neither party to the renegotiation is to be bound by *or limited to* the information he revealed at the previous step. The *de novo* reviews permit the continuous introduction of new information and shifting bargaining positions

as the contractors and the Government negotiate their way toward a final settlement. In the context of this negotiation procedure, the regulations are quite explicit concerning the timing and content of the Government's release of statement regarding the facts and rationale on which they have relied at each stage of the administrative process. 32 C.F.R. §§ 1472.3(f), 1477.2, 1477.3.

The appellees here seek to force the Board to reveal their hand—to provide the contractors with information critical to the Government's bargaining position at earlier stages of the renegotiation process than provided for in the regulations. While the Information Act may entitle them to some of the information they seek, such an interpretation of the Information Act may overbalance the scales of the Renegotiation Act in favor of the contractors. What I resist in the majority's treatment of the exhaustion issue is their failure to recognize that by interrupting the administrative proceedings while Information Act claims are being resolved in collateral judicial proceedings they have totally destroyed the balance of negotiating strength that Congress intended to exist under the Renegotiation Act.

In brief, the irreparable injury urged by these appellees as the source of their right to injunctive relief is a temporary condition that was carefully and intentionally imbedded in the structure of the renegotiation procedures—the timing of the Government's release of information concerning their bargaining position. Because this is so, the essence of the appellees' attempt to enjoin the ongoing renegotiations is a challenge to the Board's procedures themselves. In this respect the present cases are indistinguishable from *Lichter v. United States*, *supra*, *Aircraft & Diesel Equipment Corp v. Hirsch*, 331 U.S. 752 (1947), and

Macauley v. Waterman Steamship Corp., 327 U.S. 540 (1946). The holding of each of these cases is that the doctrine of exhaustion of remedies bars an injunction against ongoing Board proceedings while judicially testing those procedures.

V

An interesting postscript to the majority's discussion of the adequacy of alternative legal remedies is provided by the recent decision of the Court of Claims in *Lykes Bros. Steamship Co. v. United States*, No. 594-71 (May 12, 1972). The Court of Claims replaced the United States Tax Court as the forum for review of "final determinations" of the Renegotiation Board on July 1, 1971. One of the reasons given in the legislative history for this transfer of jurisdiction was that the Court of Claims is procedurally more suitable for handling renegotiation cases than the Tax Court. H.R. REP. No. 92-235, 92d Cong., 1st Sess. 6 (1971). *Lykes* is the first renegotiation case to have been decided in the Court of Claims since the transfer, and the congressional prophecy seems about to be fulfilled. In *Lykes* the Tax Court's former presumption of the validity of the Board's determination was reversed, and the burden of proof concerning the existence and extent of excess profits was shifted to the Government. Perhaps more significantly in the context of our cases here, the burden of going forward with evidence with regard to the statutory factors on which the contractor relies in his argument against an excess profit finding remains with the contractor, but only

to the extent that the facts pertaining thereto are within its knowledge or possession, are accessible to the public generally in the form of published reports, or are *actually made avail-*

able to the contractor by the Government, voluntarily through a request made in pre-trial proceedings, by discovery under the rules of the court, or pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

Slip opinion at 13 (emphasis in original).

I believe *Lykes* amply demonstrates the adequacy of the statutory procedures for protecting the rights of contractors engaged in renegotiation, at least to the extent of considering those procedures sufficiently adequate as to require their exhaustion instead of granting the injunctions here. The majority, in my opinion, unnecessarily and impermissibly allows the District Courts to interrupt the renegotiation process while determining a wholly collateral matter under a separate and unrelated statute.

APPENDIX B

United States District Court for the District of
Columbia

Civil Action No. 1340-70

BANNERCRAFT CLOTHING COMPANY, INC., PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

Order

Upon consideration of the Complaint herein, the Motion for a Temporary Injunction and Affidavit in support thereof, the Memorandum of Points and Authorities filed in support of the Motion, and after oral argument of counsel for both parties, it appears to the Court as follows:

1. Plaintiff, during the years 1966 and 1967, performed Government contracts which are subject to the Renegotiation Act of 1951, as amended, 50 App. U.S.C. §§ 1211-1233 (1964 ed.).

2. Defendant has determined, by letters dated April 29, 1970, copies of which are attached to the Complaint as Exhibits F and G, that Plaintiff realized excessive profits of \$75,000.00 in Fiscal Year 1966 and \$1,450,000.00 in Fiscal Year 1967. Those determinations may become final without further proceedings or notice from The Renegotiation Board.

3. Plaintiff has requested by letter dated March 16, 1970, a copy of which is attached to the Complaint as Exhibit E, that the Defendant produce certain designated records which Plaintiff believes will aid

in the preparation of and presentation of its position before The Renegotiation Board for these fiscal years.

4. Defendant has repeatedly denied requests for production of documents made by this Plaintiff and by others. (*See Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, No. 22,635 (D.C. Cir. decided March 10, 1970).)

5. Unless the Defendant, The Renegotiation Board, is enjoined from continuing the renegotiation proceedings with respect to Plaintiff's Fiscal Years 1966 and 1967, the Board will proceed to a final determination prior to a determination of the Plaintiff's right to the production of those documents heretofore requested of The Renegotiation Board by the Plaintiff.

6. In light of the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, *supra*, it is likely that Plaintiff will be successful in this litigation and that Defendant will be required to produce these documents. Plaintiff will suffer irreparable injury if the documents are not produced prior to completion of the renegotiation proceedings.

Wherefore, it is by the Court this ——— day of May, 1970,

Ordered:

That the Defendant, The Renegotiation Board, its agents, servants, employees and attorneys are hereby enjoined from continuing with the renegotiation proceedings involving the Plaintiff, Bannercraft Clothing Company, Inc., for the Fiscal Years 1966 and 1967 until further order of this Court; provided, that Plaintiff first file with the Clerk of this Court a bond in the amount of \$——— cash, or in the face amount of \$———, with surety approved by the Court.

(S) ———,

Judge.

**United States District Court for the
District of Columbia**

Civil Action No. 2403-70

**ASTRO COMMUNICATION LABORATORY, A
Division of Aiken Industries, Inc., PLAINTIFF**

v.

THE RENEGOTIATION BOARD, DEFENDANT

Order

Upon consideration of the Complaint herein, the Motion For a Preliminary Injunction, an Affidavit in support thereof, the Memorandum of Points and Authorities filed in support of the Application, and after oral argument of counsel for both parties, it appears to the Court as follows:

1. Plaintiff, during the Fiscal Year ended September 30, 1967, performed Government contracts which are subject to the Renegotiation Act of 1951, as amended. 50 App. U.S.C. §§ 1211-1233 (1964 Ed.)

2. The Renegotiator for the Eastern Regional Renegotiation Board has tentatively determined that Plaintiff realized excessive profits in the Fiscal Year ended September 30, 1967 in the amount of \$225,000. A hearing is presently scheduled before the Eastern Regional Renegotiation Board on August 24, 1970.

3. Plaintiff has requested, by letter dated April 20, 1970, a copy of which is attached to the Complaint as Exhibit A, that the Defendant produce certain designated records which Plaintiff believes will aid in the preparation of, and presentation of, its position before

the Eastern Regional Renegotiation Board and the Renegotiation Board for the fiscal year in issue. This request was denied in its entirety by the General Counsel for the Board in a letter dated July 21, 1970. The Board affirmed the decision of its General Counsel in a letter dated July 30, 1970.

4. Defendant has repeatedly denied requests for production of documents made by this Plaintiff and by others. (*See Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, No. 22635 (D.C. Cir., Decided March 10, 1970).)

5. Unless the Defendant is restrained and enjoined from continuing the renegotiation proceedings with respect to Plaintiff's Fiscal Year 1967, Defendant will proceed to a final determination prior to the Plaintiff's right to the production of certain documents requested of Defendant by the Plaintiff.

6. In light of the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, *supra*, it is likely that Plaintiff will be successful in this litigation and that Defendant will be required to produce these documents. Plaintiff will suffer irreparable injury if the documents are not produced prior to completion of the renegotiation proceedings.

Wherefore, it is by the Court this — day of August, 1970.

Ordered:

1. That the Defendant, the Renegotiation Board, its agents, servants, employees and attorneys are hereby enjoined from continuing with the renegotiation proceedings involving the Plaintiff, Astro Communication Laboratory, and from taking any other action which will affect or in any way prejudice Plaintiff's rights in connection with the renegotiation proceedings for the Fiscal Year 1967 until further order of this Court.

2. Provided that Plaintiff first file a bond in the amount of One Hundred Dollars (\$100.00) cash or in the face amount of One Hundred Dollars (\$100.00) with surety approved by the Court.

3. That the Defendant allow Plaintiff within thirty (30) days from the date of this Order to inspect and obtain copies of all documents requested by Plaintiff which Defendant has no objection to turning over to the Plaintiff.

4. That the Defendant submit to the Court *in camera* within thirty (30) days from the date of this Order, all documents which it objects to turning over to the Plaintiff, with a statement of the reasons for each such objection.

5. Plaintiff shall have fifteen (15) days thereafter to file a response to Defendant's objections.

Judge.

In the United States District Court for the
District of Columbia

Civil Action No. 2055-70

DAVID B. LILLY COMPANY, INC., A DELAWARE CORPORATION,
FOR ITSELF AND AS SUCCESSOR IN INTEREST TO
DELAWARE FASTENER CORPORATION, A DELAWARE
CORPORATION, PLAINTIFF

v.

THE RENEGOTIATION BOARD, DEFENDANT

Findings of Fact, Conclusions of Law and Order

The above entitled case came on before the undersigned Judge of the United States District Court for the District of Columbia on August 20, 1970 on the matter of the plaintiff's Motion for Preliminary Injunction, and the Court having considered the pleadings, affidavits and memoranda, hereby makes and enters the following Findings of Facts, Conclusion of Law and Order:

FINDINGS OF FACT

1. This is a civil action brought under 5 U.S.C. Sec. 552(a)(3) to compel the Renegotiation Board to produce certain documents under the so-called Freedom of Information Act. The action also seeks to enjoin the Renegotiation Board from taking certain action until the requested records are produced by it for inspection by plaintiff.

2. Plaintiff DAVID B. LILLY COMPANY, INC. ("Lilly") is, and at all material times was, a corpora-

tion established under the laws of Delaware, having its principal place of business in Wilmington, Delaware. It is also the successor corporation to Delaware Fastener Corporation ("Delfasco") as the result of a 1970 merger which occurred between these two corporations. Hereinafter, Lilly and Delfasco are referred to as "plaintiff."

3. During the year 1967, plaintiff had income from sales and/or services with respect to contracts subject to the Renegotiation Act of 1951, as amended, 50 App. U.S.C. Secs. 1211-1233 (1964 Ed.). Pursuant to 50 App. U.S.C. Sec. 1217, the Renegotiation Board, through its Eastern Regional Renegotiation Board, has undertaken renegotiation proceedings regarding the plaintiff, such renegotiation proceedings having been denominated "David B. Lilly Company, Inc.—No. 73216-67-A" and "Delaware Fastener Corporation—No. 65322-67-A."

4. The renegotiation proceedings to date have been conducted, on behalf of the government, by an Auditor (Mr. Aubrey Bendure) and a Renegotiator (Mr. Stanley Fishner) of the Eastern Regional Renegotiation Board, which officials have, over a period of time, obtained and gathered information regarding plaintiff. Prior to June 4, 1970, plaintiff had not been advised of any determination made by the government nor did the government advise plaintiff of what information it had obtained from others relating to the renegotiation proceedings.

5. At a meeting on June 4, 1970, the Renegotiator, for the first time, advised plaintiff that he had made a tentative decision that plaintiff had realized excessive profits of \$700,000 in 1967 and that such amount (less tax credits) should be refunded to the government. The Renegotiator advised, at that time, that his recom-

mendation was based in part on information obtained from others, that the recommendation was consistent with the way similarly situated contractors had been treated, that the Eastern Regional Renegotiation Board had tentatively approved his recommendation, and that plaintiff could, if it so chose, accept his recommendation or appeal to the Eastern Regional Renegotiation Board or by-pass the Eastern Regional Board and appeal directly to the Renegotiation Board itself.

6. The Renegotiator, at the June 4, 1970 meeting, read aloud a portion of his report, but he refused to disclose what facts he obtained from other sources, what "similarly situated" contractors were being used for comparison purposes and what facts were used to reach the \$700,000 figure.

7. Plaintiff was given until the close of business on July 10, 1970 to decide what course of action to take: plaintiff was advised that if it did not agree to the \$700,000 figure and did not, by July 10, 1970, elect to appeal to the Regional Board, it would lose its right to appeal to the Regional Board.

8. Because of its being faced with a decision by July 10, 1970, plaintiff, on June 29, 1970, requested that the Renegotiation Board produce, for plaintiff's inspection, certain documents to enable it to make an informed judgment by July 10, 1970 as to how to proceed. When, by July 9, 1970, the Renegotiation Board had not acknowledged the request for documents, plaintiff filed the instant suit, also filing an Application for a Temporary Restraining Order to restrain the Renegotiation Board from foreclosing it from pursuing its right to an appeal to the Eastern Regional Renegotiation Board. On July 10, 1970, the parties stipulated that the Renegotiation Board would not enforce its previously imposed deadline of July

10, 1970 and would take no action until the request for documents was acted upon. Because of this stipulation, the Application for a Temporary Restraining Order was withdrawn.

9. By letter of July 24, 1970, the Renegotiation Board's General Counsel rejected, in full, the request for documents; although that letter gave plaintiff twenty days (i.e. until August 13, 1970) to seek review by the Renegotiation Board of the General Counsel's position on documents, the Renegotiator, on July 30, 1970, advised plaintiff that it would have to decide, by the close of business on July 31, 1970, whether to accept or reject his \$700,000 recommendation. The Renegotiator further advised that if his recommendation was not accepted by Lilly on July 31, 1970, a hearing by the Eastern Regional Board would be held on August 12, 1970, even if the matter of the request for documents had not been acted on or resolved by that time.

10. On July 31, 1970, plaintiff's Application for a Temporary Restraining Order was reinstated and granted by Order of the same date, which Order was renewed on August 10, 1970 to continue in effect until August 20, 1970 when plaintiff's Motion for a Preliminary Injunction could be heard. It was not until its letter of August 14, 1970 that the Renegotiation Board upheld its General Counsel's decision not to produce any of the documents requested.

11. It was not until the morning of August 20, 1970, shortly before the commencement of the hearing on plaintiff's Motion for a Preliminary Injunction, that the government filed any pleadings or memoranda with this Court, despite the fact that the plaintiff had previously filed two affidavits, two memoranda of points and authorities and a relatively detailed complaint. Among the papers filed by the government

on August 20, 1970 was a Motion to Dismiss, but plaintiff had received no notice of this motion prior to August 20, 1970 and had had no opportunity to respond to it.

12. In its papers filed with this Court, plaintiff made reference to similar cases pending in this Court, as well as to precedents relating to the issues, and the Court inquired in detail into the facts and law from counsel for plaintiff at the time of hearing on August 20, 1970.

The documents sought by plaintiff, in its request to the Renegotiation Board and in this action, are those directly relating to the renegotiation proceedings which have now gone on for an extended period of time and to the Renegotiator's recommendation, and are therefore identifiable records for purposes of the Freedom of Information Act.

14. Plaintiff has requested five categories of documents. The first category included documents reflecting communications between the Renegotiation Board and other government agencies relating to Lilly's and Delfasco's performance under the renegotiable contracts. The government states that no such communications exist.

15. The second category of requested documents includes all sections of the Report of the Renegotiation in addition to the accounting section which had been given to plaintiff prior to this action, which report presumably reflects facts relating to the profits of plaintiff and to the question of whether such profits are excessive.

16. The third category of requested documents includes communications between non-governmental persons and the Renegotiation Board relating to the performance by Lilly and Delfasco. While the Renegotiation Board's General Counsel (on July 24, 1970)

and the Renegotiation Board itself (on August 14, 1970) refused to disclose these, the government on August 20, 1970, indicated for the first time that it would submit these to the Court for *in camera* inspection; however because this was a proffer of only a part of the documents requested, it was deemed preferable by the Court to postpone decision on those for the following reasons:

(a) because the plaintiff had had no advance notice of this proffer, it had no opportunity to formulate its own position except, on short notice, to indicate that these kinds of documents should be disclosed without first having an *in camera* inspection; and

(b) since the government's Motion to Dismiss will have to be heard in the future (tentatively October, 1970), by which time the plaintiff will have had an opportunity to respond thereto, the Court will then, after fuller briefing and arguments by the parties, be better able to determine all of the requests together rather than in piecemeal fashion.

17. Plaintiff's fourth and fifth categories of documents include certain internal documents relating to the Renegotiation proceedings, and the Court, before ruling, prefers to give further consideration to the points raised by the government in its papers filed on August 20, 1970, which it had insufficient time then to consider, and to the response thereto to be filed by plaintiff.

18. Although not ruling on the ultimate question of the extent to which plaintiff is entitled to the documents requested, or the extent to which the Court should first inspect them *in camera*, it nevertheless appears that plaintiff will suffer irreparable injury if

it is compelled to go ahead with renegotiation proceedings without the requested documents, only to have it later determined that it was entitled to some or all of the documents; it does not appear that the government will suffer any substantial injury if it is forced to hold the renegotiation proceedings in abeyance until the matter of documents has been determined. Moreover, the government's delay in acting upon plaintiff's request for documents, its blanket refusal to divulge any documents, its delay until August 20, 1970 to make a proffer to disclose to the Court *in camera* only a portion of the documents, its last-minute filing of an opposition to plaintiff's Motion and its last-minute filing of a Motion to Dismiss without notice to plaintiff, all combine to indicate to the Court that the government has not put a premium on speed and further that the equities weigh in favor of the plaintiff for purposes of plaintiff's Motion for a Preliminary Injunction, since plaintiff, absent a preliminary injunction may, if it is later determined to be entitled to some or all of the requested documents, suffer irreparable harm in the following ways:

(a) plaintiff would, without full and adequate information, be forced to decide whether to appeal to the Eastern Regional Board or to by-pass that body;

(b) since the Eastern Regional Renegotiation Board has the power to increase the Renegotiator's recommendation, plaintiff faces the hazard of electing, on inadequate information, a procedure which could jeopardize plaintiff even further;

(c) since the Renegotiation Board's own regulations provide for review by the Eastern Regional Renegotiation Board, plaintiff would be deprived of the benefits of such regulation since it would be forced to proceed with that procedure in less than a meaningful way be-

cause of its lack of information as to the basis of the present recommendation;

(d) in order properly to take advantage of the administrative procedures provided to it, plaintiff needs all available information in order to make an effective presentation, and to force plaintiff to proceed now, without information it is entitled to have, would dilute its right to take full advantage of the administrative procedures before a tentative recommendation ripens into a final determination;

(e) plaintiff faces not only the risk of an increased determination as to excessive profits, but pursuit of its administrative remedies will involve the additional cost of administrative expense, effort and time as well as legal fees, and, without adequate information for developing an effective presentation, such expenditures could be rendered useless;

(f) information contained in the documents sought might supply data which the plaintiff either could not otherwise obtain or could obtain only through the expenditure of a considerable amount of time and money;

(g) to compel plaintiff to go forward with the procedures of the Renegotiation Board, without the information it may be entitled to, would, in view of what is involved, be a deprivation of fundamental fairness and would deprive plaintiff of due process of law.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the subject matter hereof under 5 U.S.C. Sec. 552(a)(3) and 28 U.S.C. Sec. 1331, and has the authority to enter its preliminary injunction under this Court's general equity powers.

2. Pursuant to 5 U.S.C. Sec. 552(a)(3), the defendant has the burden of sustaining its refusal to pro-

duce identifiable records which have been properly requested.

3. Plaintiff has made a proper request for identifiable documents, has demonstrated its need therefor, and, at this stage of the litigation, the Court is not persuaded that the government has sustained its refusal to produce the requested documents.

4. The plaintiff will suffer greater harm if its Motion for a Preliminary Injunction is improperly denied than the harm the defendant may suffer if the said Motion is improperly granted.

5. In the event that plaintiff is found to be entitled to some or all of the documents requested, it would suffer irreparable harm by being forced to proceed further in renegotiation without such documents.

6. Production of documents at some later stage of the renegotiation proceedings, after plaintiff has been forced to proceed without such data, would not be an adequate remedy since plaintiff would have lost its right to utilize effective and enlightened presentations at each stage of the administrative process.

7. To deprive plaintiff of information otherwise available to it at this stage of the administrative proceedings and then to compel plaintiff to proceed further without such information would be a denial of due process for which plaintiff has no adequate remedy at law.

8. Justice requires that further renegotiation proceedings be restrained until this Court has had the opportunity to consider the law and facts fully and then to rule on the question of whether plaintiff is entitled to any of the documents requested. Absent the granting of plaintiff's Motion for a Preliminary Injunction, plaintiff may suffer irreparable harm for which it will have no adequate remedy at law.

9. There is a likelihood that plaintiff will prevail in whole or in part in its request for documents, and plaintiff's request does not, as a whole, appear frivolous. Since defendant's Motion to Dismiss, filed without advance notice on August 20, 1970, is to be heard by this Court at a future date, and since there is no showing by the government that it will be injured by such delay, this Court will grant plaintiff's Motion for a Preliminary Injunction until the matter of the request for documents is ultimately resolved.

PRELIMINARY INJUNCTION ORDER

This case having come on before the undersigned Judge of the United States District Court for the District of Columbia on the matter of the plaintiff's Motion for a Preliminary Injunction, and the Court having considered the Complaint, affidavits and memoranda filed and having previously considered and granted plaintiff's Application for a Temporary Restraining Order, and the Court having made the foregoing Findings of Fact and Conclusions of Law, now therefore,

It is hereby ordered

1. The Defendant, the Renegotiation Board, its agents, servants, employees, and attorneys be and hereby are enjoined from continuing with or instituting any further proceedings or actions in connection with the renegotiation proceeding involving the plaintiff, David B. Lilly Company, Inc. and Delaware Fastener Corporation, for the fiscal year 1967; from requiring plaintiff to elect whether to enter into a "renegotiation agreement" or to request a panel meeting before the defendant's Eastern Regional Renegotiation Board or to appeal directly to the Renegotiation Board; from taking any action to prejudice or curtail

plaintiff's right to request a panel meeting before defendant's Eastern Regional Renegotiation Board; and from taking any other action which will affect, or in any way prejudice, plaintiff's right in connection with the renegotiation proceedings aforesaid, until further Order of this Court.

2. That plaintiff's bond and security in the amount of \$100.00 cash shall continue to be maintained with the Clerk of the Court until further Order of this Court.

Signed and entered this day of September, 1970
at o'clock, m.

Judge, United States District Court.

APPENDIX C

The Public Information Act, 5 U.S.C. 552, provides in relevant part:

5 U.S.C. 552(a)(2):

Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public; unless the materials are promptly published and copies offered for sale. * * *. A final order opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph;

(ii) the party has actual and timely notice of the terms thereof.

5. U.S.C. 552(a)(3):

Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, or request for identifiable records * * * shall make the records promptly available to any person. On com-

plaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records or to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter *de novo* and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member.

The Procedures and authority of the Renegotiation Board are contained in 50 U.S.C. App. 1211 *et seq.*, which provides *inter alia*:

§ 1215. Renegotiation proceedings—Proceedings before Board

(a) Renegotiation proceedings shall be commenced by the mailing of notice to that effect, in such form as may be prescribed by regulation, by registered mail or by certified mail to the contractor or subcontractor. The Board shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits received or accrued, and with respect to such other matters relating thereto as the Board deems advisable. Any such agreement, if made, may, with the consent of the contractor or subcontractor, also include provisions with respect to the elimination of excessive profits likely to be received or accrued. If the Board does not make an agreement with respect to the elimination of excessive profits received or accrued, it shall issue and enter an order determining the amount, if any, of such excessive profits, and forthwith give notice thereof by registered mail

or by certified mail to the contractor or subcontractor. In the absence of the filing of a petition with The Tax Court of the United States under the provisions of and within the time limit prescribed in section 109, such order shall be final and conclusive and shall not be subject to review or redetermination by any court or agency. * * * Whenever the Board makes a determination with respect to the amount of excessive profits, and such determination is made by order, it shall, at the request of the contractor or subcontractor, as the case may be, prepare and furnish such contractor or subcontractor with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination. Such statement shall not be used in The Tax Court of the United States as proof of the facts or conclusions stated therein.

METHODS OF ELIMINATING EXCESS PROFITS

(b) (1) General procedures. Upon the making of an agreement, or the entry of an order, under subsection (a) of this section by the Board, or the entry of an order under section 108 by The Tax Court of the United States, determining excessive profits, the Board shall forthwith authorize and direct the Secretaries or any of them to eliminate such excessive profits—

(A) by reduction in the amounts otherwise payable to the contractor under contracts with the Departments, or by other revision of their terms;

(B) by withholding from amounts otherwise due to the contractor any amount of such excessive profits;

(C) by directing any person having a contract with any agency of the Government, or any subcontractor thereunder, to withhold for the account of the United States from any amounts otherwise due from such

person or such subcontractor to a contractor, or subcontractor, having excessive profits to be eliminated and every such person or subcontractor receiving such direction shall withhold and pay over to the United States the amounts so required to be withheld;

(D) by recovery from the contractor or subcontractor or from any person or subcontractor directed under sub-paragraph (C) to withhold for the account of the United States, through payment, repayment, credit, or suit any amount of such excessive profits realized by the contractor or subcontractor or directed under subparagraph (C) to be withheld for the account of the United States; or

(E) by any combination of these methods, as is deemed desirable.

(2) Interest. Interest at the rate of 4 per centum per annum shall accrue and be paid on the amount of such excessive profits from the thirtieth day after the date of the order of the Board or from the date fixed for repayment by the agreement with the contractor or subcontractor to the date of repayment, and on amounts required to be withheld by any person or subcontractor for the account of the United States pursuant to paragraph (1) (C), from the date payment is demanded by the Secretaries or any of them to the date of payment.

* * * * *

PERIODS OF LIMITATIONS

(c) In the absence of fraud or malfeasance or willful misrepresentation of a material fact, no proceedings to determine the amount of excessive profits for any fiscal year shall be commenced more than one year after a financial statement under subsection (e) (1) of this section is filed with the Board with respect to such year, and, in the absence of fraud or

malfeasance or willful misrepresentation of a material fact, if such proceedings is not commenced prior to the expiration of one year following the date upon which such statement is so filed, all liabilities of the contractor or subcontractor for excessive profits received or accrued during such fiscal year shall thereupon be discharged. If an agreement or order determining the amount of excessive profits is not made within two years following the commencement of the renegotiation proceeding, then, in the absence of fraud or malfeasance or willful misrepresentation of a material fact, upon the expiration of such two years, all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged, except that (1) if an order is made within such two years pursuant to a delegation of authority under subsection (d) of section 107, such two-year limitation shall not apply to review of such order by the Board, and (2) such two-year period may be extended by mutual agreement.

* * * * *

§ 1218. *Review by Court of Claims*

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may—

* * * * *

file a petition with the Court of Claims for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order to determine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency except as provided in section

108A [section 1218a of this Appendix]. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding *de novo*. In the case of any witness for the Board, the fees, and mileage and the expenses of taking any deposition shall be paid out of appropriations of the Board available for that purpose, and in the case of any other witnesses shall be paid, subject to rules prescribed by the court, by the party at whose instance the witness appears or the deposition is taken. The filing of a petition under this section shall operate to stay the execution of the order of the Board under subsection (b) of section 105 [section 1215(b) of this Appendix] only if within ten days after the filing of the petition the petitioner files with the Court of Claims a good and sufficient bond, approved by such court, in such amount as may be fixed by the court. Any amount collected by the United States under an order of the Board in excess of the amount found to be due under a determination of excessive profits by the Court of Claims shall be refunded to the contractor or subcontractor with interest thereon from the date of collection by the United States to the date of refund at the rate per annum determined pursuant to the next to the last sentence of section 105(b)(2) [section 1215(b)(2) of this Appendix] for the period which includes the date on which interest begins to run.

§ 1218a. Review of Court of Claims decisions.

The decisions of the Court of Claims under section 108 [section 1218 of this Appendix] shall be subject

to review by the Supreme Court upon certiorari in the manner provided in section 1255 of Title 28 for the review of other cases in the Court of Claims.

§ 1219. *Rules and regulations*

The Board may make such rules, regulations, and orders as it deems necessary or appropriate to carry out the provisions of this title.

§ 1221. *Application of Administrative Procedure Act*

The functions exercised under this title shall be excluded from the operation of the Administrative Procedure Act (60 Stat. 237) except as to the requirements of section 3 thereof.

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE RENEGOTIATION BOARD, PETITIONER,

v.

**BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC., RESPONDENTS.**

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF IN OPPOSITION FOR RESPONDENT
DAVID B. LILLY CO., INC.**

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, *PETITIONER*,

v.

**BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC., *RESPONDENTS*.**

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF IN OPPOSITION FOR RESPONDENT
DAVID B. LILLY CO., INC.¹**

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. A. 1a-44a) is reported at 466 F.2d 345. The Findings of Fact, Conclusions of Law and Order of the District Court

¹ Respondents Bannercraft Clothing Co., Inc. and Astro Communication Laboratory, a Division of Aiken Industries, Inc. are represented by separate counsel, who are filing a Brief on their behalf.

in *David B. Lilly Co., Inc. v. The Renegotiation Board* (Pet. App. B. 50a-60a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1972. On October 4, 1972, the Chief Justice extended the time within which to file a Petition for a Writ of Certiorari to November 18, 1972. The Chief Justice, on November 8, 1972, granted a further extension of time to December 4, 1972, and the Petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Where, during the course of renegotiation proceedings, the Renegotiation Board ("Board") refuses to produce certain documents requested by the contractor, and where the contractor files an action under the Freedom of Information Act to obtain those documents,² does the District Court have the power to preliminarily enjoin the Board from proceeding further, until the Court can, on an expedited basis, rule on the contractor's entitlement to such documents for its use in the renegotiation proceedings?

²The applicability of the Freedom of Information Act to the Renegotiation Board is not disputed. *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F.2d 578 (1970).

STATUTES INVOLVED

The relevant sections of the Freedom of Information Act, 5 U.S.C. §551 *et seq.*, and of the Renegotiation Act, 50 U.S.C. App. §1211 *et seq.*, are set forth in Pet. App. C. 61a-67a.

STATEMENT OF THE CASE

The United States District Court for the District of Columbia preliminarily enjoined the Renegotiation Board from conducting further renegotiation proceedings with regard to the fiscal year 1967 of David B. Lilly Co., Inc., until the Court could determine the enforceability of a request (made under the Freedom of Information Act and which the Board had totally denied) for documents relating to, and needed in, that proceeding.

During 1967, Respondent David B. Lilly Co., Inc.³ ("Lilly") was engaged in the performance of certain contracts or subcontracts, which were subject to the Renegotiation Act of 1951, as amended. 50 U.S.C. App. §1211 *et seq.* (Joint App. 83a, 117a).⁴ After Lilly filed the standard form of contractor's report ("RB-1") with the Renegotiation Board for 1967, renegotiation proceedings were commenced. As the initial step, the

³The contracts and subcontracts subject to renegotiation were performed by David B. Lilly Co., Inc., and Delaware Fastener Corporation. After the renegotiation proceedings were commenced, more particularly in January 1970, Delaware Fastener Corporation was merged into David B. Lilly Co., Inc., which brought the instant case on its own behalf and as successor to Delaware Fastener Corporation by merger (Joint App. 73a).

⁴References to the Joint Appendix filed in the United States Court of Appeals for the District of Columbia Circuit are cited "Joint App."

Eastern Regional Renegotiation Board assigned the case to two members of its staff, an auditor and a renegotiator (Joint App. 74a, 117a). Over an extended period of time, an intensive investigation of the contractor was conducted. Information was obtained by the Eastern Board's staff from the contractor as well as from separate outside sources. At no time did anyone from the Board advise Lilly of the information which had been obtained independently, the source of such information, or the significance placed on any particular information (Joint App. 75a, 84a).

At a renegotiation conference held June 4, 1970, Lilly was told, for the first time, that the renegotiator had determined that there were excessive profits totaling \$700,000 for fiscal 1967 (Joint App. 75a, 80a, 84a). The renegotiator advised that Lilly could (1) accede to the \$700,000 determination, (2) take an appeal to a panel of the Eastern Regional Board, which, the renegotiator pointed out, had already tentatively approved the determination two weeks earlier, without notice to Lilly, or (3) appeal directly to the Statutory Board (Joint App. 75a, 84a, 118a). Lilly was given until July 10, 1970 to decide what course to follow; and Lilly was told that if it did not elect by July 10, 1970 to appeal to the Eastern Regional Board, it would lose that right completely (Joint App. 84a-118a). While the Eastern Board staff advised that Lilly was being treated consistently with the way in which other similarly situated contractors were treated, no disclosure was made as to what comparisons or comparative data had been used or as to any other factual data on which the determination had been based, other than the financial data which had come from the contractor itself (Joint App. 85a, 118a).

Before hazarding an appeal in which the Eastern Board or the Statutory Board could increase the amount of allegedly excessive profits, or acquiescing, on insufficient knowledge, in the renegotiator's \$700,000 determination, Lilly wanted to know the facts on which the renegotiator's determination was predicated, and the significance given to such facts. This information was needed not only to correct possible erroneous factual premises and perhaps present rebuttal information, but also to make an enlightened decision as to how to proceed administratively and as to what kind of effective presentation to prepare and make (Joint App. 84a, 85a).

Prior to the July 10 deadline, in an effort to obtain data necessary to make an intelligent and informed judgment as to how to proceed, Lilly requested that the Board provide it with information in certain enumerated categories (Joint App. 80a). On July 9, 1972 (the day before the Board's imposed deadline), Lilly still had received no response from the Board, which was insisting on its ultimatum that Lilly either acquiesce in the \$700,000 determination, or, by July 10, 1970, elect (at the risk of losing) its right to appeal to the Eastern Regional Board. Lilly, on July 9, 1970, filed a complaint in the District Court seeking an order compelling the Board to provide the requested information and a stay of further administrative proceedings until the matter of the contractor's right to information was resolved (Joint App. 83a, 85a, 86a, 87a). By stipulation, counsel for the Board agreed to lift the ultimatum and advised that the Renegotiation Board would give consideration to Lilly's request for documents (Joint App. 92a, 95a).

By letter dated July 24, 1970, the Board's General Counsel denied the request for documents in its entirety, but advised that Lilly could have the Board review his

decision by making a request, in writing, within twenty days of the date of the letter (Joint App. 103a-105a).

On July 30, 1970, three days after Lilly's receipt of the General Counsel's letter, the Eastern Regional Board, despite the contractor's twenty day period to appeal the denial of documents, demanded that the contractor decide by the close of business on the next day (July 31, 1970) either to pay the \$700,000 or to appear before a panel of the Eastern Regional Board on August 12, 1970 (Joint App. 93a). Lilly asked that a later date be selected in order to permit the Board to review the decision of its General Counsel. The Eastern Regional Board refused, insisting on a hearing on that date, whether or not the request for documents was still unresolved (Joint App. 93a). In addition, the Eastern Regional Board imposed a new ultimatum. Originally, the Eastern Regional Board had threatened that if Lilly did not meet the July 10 deadline, it would lose its right to appeal to the Eastern Regional Board. The new ultimatum was that either Lilly appear on August 12, or the Eastern Regional Board would review the matter in its absence, at which review the \$700,000 amount could be increased (Joint App. 93a).

The next day the contractor renewed its Application for a Temporary Restraining Order to avoid the latest ultimatum (Joint App. 89a). Counsel for the contractor and counsel for the Renegotiation Board appeared before the District Court, which, after brief argument, entered a Temporary Restraining Order (Joint App. 97a-99a). The Restraining Order was extended to August 20, 1970, on which date a hearing was scheduled on Lilly's Motion for a Preliminary Injunction (Joint App. 100a-101a). On August 14, 1970, the Renegotiation Board advised that it

would not permit access to any of the documents needed (Joint App. 108a).

Despite the fact that Lilly's action was filed in the District Court on July 9, 1970, it was not until August 20, 1970, minutes before the hearing on Lilly's Motion for a Preliminary Injunction, that the Board filed its first pleadings—a Motion to Dismiss the Complaint, or in the Alternative for Summary Judgment, and An Opposition to the Motion for a Preliminary Injunction (Joint App. 102a, 119a). After a hearing on August 20, 1970, the District Court issued a preliminary injunction against further proceedings until the Board's Motion to Dismiss the Complaint could be heard. Because that Motion to Dismiss had been filed on the morning of the hearing, the District Court gave the contractor time to respond, and indicated it would set a date for a hearing on the Board's Motion. Without waiting for such hearing, and without delivering the disputed documents to the District Court for an *in camera* inspection, the Board filed a Notice of Appeal from the Findings of Fact, Conclusions of Law and Preliminary Injunction Order entered by the District Court on September 1, 1970 (Pet. App. B. 50a-60a). Thereafter, on appeal, the Court below affirmed the preliminary injunction, and the present Petition was filed. The District Court has not, in view of the Board's appeal and Petition, been called upon to rule finally on the propriety of Lilly's request for documents.

REASONS FOR DENYING THE WRIT

Certainly it is an important question whether the express remedy provided in the Freedom of Information Act is the exclusive remedy, preempting all other equitable remedies such as the one ordered in the case at

bar. There is also an important question as to balancing the desire for judicially enforced fundamental fairness in administrative proceedings against the right of an agency to conduct its business with dispatch, without interruption and without being subordinate to intervening orders of the judiciary. We also recognize that there have been inconsistent decisions in the district courts on the issue (Pet. 9, n. 4). Despite these considerations, Lilly contends that, as to the merits, the decision of the majority below is correct, is fully consistent with governing authority and should stand as sound precedent for other cases. There should be, and is, judicial power to exercise discretion in issuing injunctions such as the one in the case at bar, and the only question in such cases should be, and is, whether that discretion has been abused, a question neither presented in this case nor one needing resolution by this Court. As to the points raised in the Petition, Lilly denies the Board's contention that the Freedom of Information Act, expressly or by "inescapable inference", prohibits an injunction such as entered in this case. Further, Lilly denies that the decision below conflicts with a decision of the Sixth Circuit so as to require resolution by this Court, and denies that the decision below is contrary to decisions of this Court.

1. *The Freedom of Information Act.*

Although the Freedom of Information Act includes a specific equitable remedy, it does not follow, as Petitioner contends (Pet. 5), that Congress intended to withhold from the District Court "any of the usual weapons in the arsenal of equity"⁵ to effect the

⁵*Bannercraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 354.

legislative intent. Historically, courts sitting in equity—as does the District Court under the Freedom of Information Act—have had broad powers to fashion complete relief not inconsistent with the expressed statutory purposes. *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). Thus, as this Court has observed, when Congress confers equitable jurisdiction, it does so in light of this tradition,⁶ and accordingly, as stated in *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946):⁷

[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Although the Board argues that exercise of additional equity powers, regardless of the circumstance, "is inconsistent with and unnecessary to effectuate the Act's purposes" (Pet. 5, 6-8), neither statutory language nor legislative history supporting the Board's "inconsistent and unnecessary" thesis is cited. Here, neither expressly nor by "inescapable inference" does the Freedom of Information Act restrict the District Court to the specific equitable remedy provided in 5 U.S.C. §552(a)(3). It is this fact which renders inapposite the Renegotiation Board's reliance on *United States v. Babcock*, 250 U.S. 328 (1919). In *Babcock*, the Court of Claims attempted to review a decision of the Treasury Department where the statute expressly provided that the Treasury Department's decision "shall be held as finally determined, and shall never thereafter be reopened or considered." *United*

⁶*Clark v. Smith*, 13 Pet. 195, 203 (1839) cited with approval in *Mitchell v. Robert DeMario Jewelry, Inc.*, *supra*, at 292.

⁷See also, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

States v. Babcock, supra, at 331. As the majority in the Court below correctly observed, although the principal object of the Freedom of Information Act was "opening administrative processes to the scrutiny of the press and general public,"⁸ another and valid, albeit subsidiary, purpose was to alleviate "the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information."⁹ S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966).¹⁰ The Board's attempt to withhold information, while speeding the administrative proceedings to a close, by imposing inconsistent and burdensome

⁸*Bannercraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 352.

⁹*Bannercraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 352.

¹⁰In its Petition, the Renegotiation Board suggests that "[i]t is at least arguable . . . the contractors must be thoroughly familiar with all the significant facts. . . ." [Pet. 11, n. 6] and that the sanction that unpublished opinions, policies, and rules may not be relied upon or cited against those without actual notice, adequately protects Lilly [Pet. 7, n. 3]. However, the Board based its determination of excessive profits, *inter alia*, on comparisons between Lilly and other "similarly situated contractors", comparative data, and factual and financial information gathered by the Board from undisclosed sources. None of this information has been made available to Lilly; and the "unpublished opinions" sanction has not induced the Board either to provide the data or not rely upon it. Without much of the basic information on which the initial determination was based, Lilly could hardly make an intelligent or informed judgment whether to accede to the renegotiator's determination or appeal to the Eastern Regional Board. And, if an appeal were elected, it could not present its case effectively without knowing what factual errors to correct or what arguments to make. Compare, *Gonzales v. United States*, 348 U.S. 407 (1955); *American Mail Line Ltd. v. Gulick*, 133 U.S. App. D.C. 382, 411 F.2d 696 (1969).

ultimatums, threatened a complete frustrating of this "subsidiary" congressional objective. By preserving the *status quo*, the injunctive remedy below assured the Board's compliance with the requirements of the Freedom of Information Act at a time when that compliance would be meaningful, as Congress intended. Such a result is in no way inconsistent with the Freedom of Information Act, or with any "inescapable inference" that may be drawn from that statute's provisions.

2. *The Decision of the Sixth Circuit in Sears, Roebuck and Co. v. National Labor Relations Board.*

While the Sixth Circuit's decision in *Sears, Roebuck and Co. v. National Labor Relations Board* 433 F.2d 210 (1970), might appear to conflict with the majority opinion below, any such conflict is more apparent than real. In *Sears*, the Sixth Circuit was faced with a situation where the agency's withholding of records, even if wrongful under the Freedom of Information Act,¹¹ did not cause the kind of irreparable harm required by *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938) to

¹¹In *Sears*, the District Court had concluded that the National Labor Relations Board had complied with the Freedom of Information Act. By contrast, here, the District Court concluded, in the face of the Renegotiation Boards blanket refusal to produce the requested documents, that:

There is a likelihood that plaintiff will prevail in whole or in part in its request for documents, and plaintiff's request does not, as a whole, appear frivolous. (Pet. App. 59a)

The Board's failure even to provide the requested documents to the District Court for an *in camera* inspection prevented the Court's finally resolving Lilly's entitlement to the documents.

permit enjoining administrative proceedings.¹² Under the National Labor Relations Act, as the Sixth Circuit noted, National Labor Relations Board decisions are reviewable in the United States Court of Appeals both as to substantive and procedural matters. 29 U.S.C. §160. On review, the Court can cure an NLRB denial of procedural rights by remanding the matter for a further, or new, and proper hearing. Thus, if Sears' statutory rights were frustrated by the NLRB's refusal to comply with the Freedom of Information Act before concluding its proceedings, the administrative proceedings could be reopened after Sears had secured a remand and a proper administrative hearing afforded. By contrast, the Renegotiation Act does not authorize any procedure to reopen the proceedings before the Board. The "review" in the United States Court of Claims in renegotiation matters does not permit an inquiry into any aspect of the Board proceedings; and it does not permit a remand to the agency to cure even the most flagrant error.¹³ Thus, where a contractor is denied procedural rights in proceedings before the Board, those rights are forever lost, unless the proceedings can be held in abeyance until the District Court resolves the issue of the Board's compliance with the Information Act. It was in this setting that the majority opinion in the Court below concluded that the case at bar presented, as distinguished from

¹²Interestingly, the District of Columbia Circuit reached the same result, though perhaps on different reasoning, in another case involving Sears and the NLRB. *Sears, Roebuck and Co. v. National Labor Relations Board*, Docket No. 72-1425, decided October 24, 1972 (D.C. Cir.).

¹³50 U.S.C. App. §1218 explicitly directs the United States Court of Claims to ignore all that has occurred during the agency proceedings.

Sears, "the sort of clear threat to a statutory right, which can easily be categorized as an impending irreparable harm" warranting Equity's intervention. *Bannercraft Clothing Co., Inc. v. The Renegotiation Board*, 466 F.2d at 356.

3. *Previous Decisions of this Court.*

Despite certain language quoted by the Board (Pet. 10) from this Court's decisions in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947), *Lichter v. United States*, 334 U.S. 742 (1948), and *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540 (1946), there is no real conflict between those cases and the decision of the majority below in this case. In the cited decisions of this Court, the contractors, by seeking judicial determinations which would have resolved questions as to the extent of their liability or susceptibility to renegotiation, were attempting to wrest from the Board and the Tax Court¹⁴ matters expressly committed to them for decision. Here, unlike in the cited cases, there is no attempt to have the courts prematurely determine issues committed to the jurisdiction of the administrative agency. The decision below merely preserves the *status quo*; it has no substantive effect on the renegotiation proceedings. Moreover, contrary to Petitioner's assertion (Pet. 10), this Court did not, in *Aircraft & Diesel*, rule out the District Court's exercising its general equity jurisdiction in an appropriate case pending before the Renegotiation Board, i.e., a case where the contractor did not have an adequate

¹⁴On July 1, 1971, the Court of Claims replaced the United States Tax Court as the forum for the final *de novo* proceeding contemplated by the Renegotiation Act. 50 U.S.C. App. §1218 (1972 pocket part).

remedy at law. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. at 773-774.

Since the District Court did not purport to resolve any substantive issues committed initially to the Board for its determination by the Renegotiation Act, and since Lilly did everything it could to obtain the data from the Board before seeking judicial intervention, there can be no valid contention that Lilly failed to exhaust its administrative remedies.

CONCLUSION

Based on the foregoing, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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January 3, 1973

IN THE

MICHAEL RODRIG, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, Defendant-Petitioner

v.

**BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC.,
*Plaintiffs-Respondents***

**On Petition for a Writ of Certiorari to the United States Court
of Appeals for the District of Columbia Circuit**

**BRIEF OF RESPONDENTS BANNERCRAFT CLOTHING
COMPANY, INC., AND ASTRO COMMUNICATION
LABORATORY IN OPPOSITION TO PETITION**

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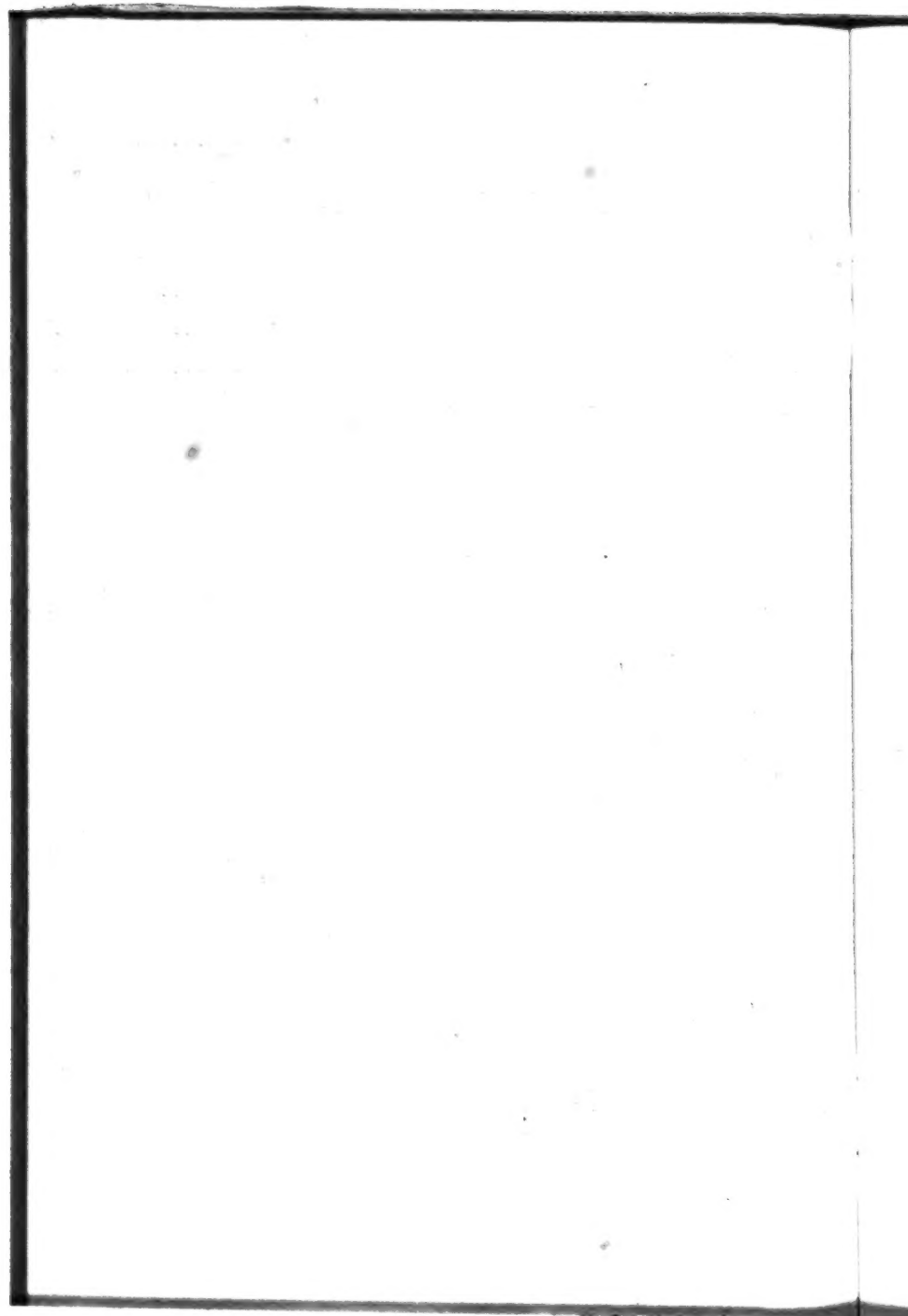
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No.

THE RENEGOTIATION BOARD, *Defendant-Petitioner*

v.

BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO COMMUNICATION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC.,
Plaintiffs-Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENTS BANNERCRAFT CLOTHING COMPANY, INC., AND ASTRO COMMUNICATION LABORATORY IN OPPOSITION TO PETITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 466 F.2d 345 and is appended to the Petition for a Writ of Certiorari. The orders of the District Court are unreported and are also appended to the Petition for a Writ of Certiorari.

JURISDICTION

Respondents do not question the jurisdiction as set forth in the Petition for a Writ of Certiorari.

QUESTION PRESENTED

The sole question presented is whether the United States District Court for the District of Columbia properly stayed proceedings before the Renegotiation Board until the Board had complied with the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1970).

STATUTES AND REGULATIONS

The relevant portions of the Freedom of Information Act, 5 U.S.C. § 552 (1970), and the Renegotiation Act of 1951, 50 U.S.C. § 1211, *et seq.* (1970), are appended to the Petition.

STATEMENT OF THE CASE

On March 16, 1970, Bannercraft Clothing Company, Inc. (hereinafter "Bannercraft"), sent a letter to the Renegotiation Board (hereinafter "the Board") requesting that it produce for inspection and copying, pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1970), six separate categories of documents. In a letter dated April 29, 1970, Bannercraft was informed that the Board had determined that Bannercraft had realized excessive profits in the amounts of \$75,000 out of a total profit of \$253,000 in its fiscal year 1966, and \$1,450,000 out of a total profit of \$1,739,000 in its fiscal year 1967. Bannercraft was ordered to reply to this letter prior to May 12, 1970, and to state in its reply whether or not it would agree with the Board's determination. Failure to agree, the Board stated, would result in a unilateral final order directing Bannercraft to pay the entire amount asserted by the Board.

On May 1, 1970, Bannercraft filed, pursuant to 5 U.S.C. § 552, in the United States District Court for the District of Columbia, a complaint for an injunction requesting that the court enjoin the Board from withholding the documents which had been requested by Bannercraft. The complaint also requested that the Board be enjoined from conducting any further proceedings in connection with the renegotiation of Bannercraft's fiscal years 1966 and 1967 since the documents were important to Bannercraft's presentation of its case to the Board.

The District Court on May 6, 1970, stayed the Board from proceeding with the renegotiation of Bannercraft until further order of the court. After hearing, the court, relying on *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 425 F.2d 578 (1970), determined that Bannercraft was likely to succeed on the merits, viz. it would be entitled to the documents, and entered a preliminary injunction on May 15, 1970 enjoining the Board from proceeding with the renegotiation of Bannercraft until the Board complied with the relevant provisions of the Freedom of Information Act. The Board, however, refused to comply with that Act and chose to file a Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit.

By letter dated April 20, 1970, Astro Communication Laboratory (hereinafter "Astro") sent a letter to the Board and requested that the Board make available to it for inspection and copying, pursuant to the provisions of the Freedom of Information Act, five classes of documents in the possession of the Board. By letter dated July 21, 1970, three months after the request was

made, the Board's General Counsel denied Plaintiff's request in its entirety and declined to produce any of the documents which had been requested by Astro. The decision of the General Counsel was affirmed by the Board on July 30, 1970.

Immediately thereafter, a hearing before the Eastern Regional Renegotiation Board was scheduled for August 24, 1970. On August 11, 1970, Astro filed a complaint in the United States District Court for the District of Columbia, requesting that the Board be enjoined from withholding documents to which Astro was entitled under the Freedom of Information Act and that proceedings before the Board be stayed until further order of the court.

The District Court, on August 21, 1970, enjoined the Board from proceeding with the renegotiation of Astro until the Board complied with the provisions of the Freedom of Information Act. The court directed the Board to permit Astro to inspect and obtain copies of all documents which the Board had no objection to producing and to submit those documents which the Board objected to turning over to Astro, to the court, for an *in camera* inspection within 30 days of the date of the court's Order, August 21, 1970.

The Board, however, declined to submit any of the documents to the court for *in camera* inspection and belatedly asserted Executive Privilege as to those documents. The court directed the Board to submit the documents to the court for an *in camera* inspection to review the claim of Executive Privilege and the claim of exemption from the provisions of the Freedom of Information Act, whereupon the Board chose to appeal both that order and the granting of the injunction

against further Board proceedings to the United States Court of Appeals for the District of Columbia Circuit.

The cases were consolidated for hearing in the United States Court of Appeals for the District of Columbia Circuit with the case of *David B. Lilly Co., Inc. v. The Renegotiation Board*, D.C. Cir. No. 71-1025. After oral argument on March 9, 1972, the Court of Appeals held that the proceedings before the Board had been properly stayed by the District Court and remanded the cases to the District Court for further proceedings and final decision on the merits of each.

ARGUMENT

Petitioner asserts that this decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Sears, Roebuck and Co. v. National Labor Relations Board*, 433 F.2d 210 (1970), and, in addition, is contrary to this Court's decisions in *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947) and *Lichter v. United States*, 334 U.S. 742 (1948). Each contention is without merit.

In *Sears, Roebuck and Co. v. National Labor Relations Board*, *supra*, the Court of Appeals for the Sixth Circuit found that:

... the district court properly dismissed the complaint for lack of jurisdiction, since it does not have the power to enjoin or to review decisions of the National Labor Relations Board. [*Ibid* at 211]

In so finding, the court merely followed a long line of precedent which began with *Myers v. Bethlehem*

Shipbuilding Corp., 303 U.S. 41 (1938), holding that because of the provisions of the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* (1970), vesting exclusive judicial review in the United States courts of appeal, the district courts are without authority to enjoin Board proceedings. Further, this Act, unlike the Renegotiation Act, *supra*, provides for a comprehensive due process administrative hearing before the Board. There is, then, no conflict between the *Sears* case and this case, which is based on the provisions of the Freedom of Information Act and the Renegotiation Act, and the congressionally intended nature of the renegotiation process.

In both *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*, and *Lichter v. United States*, *supra*, plaintiffs had requested the District Court to make determinations which would have had the effect of concluding the renegotiation proceedings, jurisdiction over which, in the first instance, had been placed with the Renegotiation Board and then with the United States Tax Court. Respondents here sought no relief as to the validity or application of the Renegotiation Act. The District Court was asked only to maintain the status quo of the renegotiation proceedings until the Renegotiation Board had complied with the Freedom of Information Act. Further, the cited cases were decided twenty years prior to the enactment of the Freedom of Information Act upon which the decision in this case is based.

In thus preserving the status quo, the District Court herein avoided the problem presented in *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, 425 F.2d 578 (1970), on remand 325 F.

Supp. 1146 (1971).¹ There, plaintiff filed a request with the Renegotiation Board for documents under the Freedom of Information Act during the pendency of its renegotiation proceedings. The Board refused to produce any of the requested documents and proceeded to a final determination against Grumman long before the court of appeals found that Grumman was entitled to the documents which it sought.

Petitioner asserts that this case presents an important question to this Court. We do not agree. The decision of the court of appeals was based upon the facts present in these cases and is therefore of limited applicability. The Renegotiation Board has attempted at every opportunity to make a sham of the Freedom of Information Act, engaging in constant litigation to avoid compliance with the Act. *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, *supra*; *American Manufacturing Company of Texas v. The Renegotiation Board*, D.C. Cir., No. 71-1760 decided October 19, 1972; *Fisher v. The Renegotiation Board* — F.2d — (D.C. Cir.), decided November 10, 1972; *Holly Corporation v. The Renegotiation Board*, C.D. Cal. No. 69-198 decided February 11, 1969; *Holly Corporation v. The Renegotiation Board*, D.C. D.C. No. 1239-70 decided May 12, 1970; *General Manufacturing Corp. v. The Renegotiation Board*, D.N.J. No. 965-70, decided November 5, 1970.

The same court of appeals which decided these cases has recently indicated that, given a set of facts slightly different from those contained herein, it would reach a

¹ The Renegotiation Board has again filed an appeal in this case which is now pending in the United States Court of Appeals for the District of Columbia Circuit, No. 72-1425.

contrary result, *Sears, Roebuck and Co. v. National Labor Relations Board*, — F.2d — (D.C. Cir., No. 72-1425, decided October 24, 1972). In that case the court reaffirmed its finding that there is in the district court, "jurisdiction to enjoin agency proceedings pending resolution of a Freedom of Information Act claim" (Slip Op. at 3). The court went on to state:

... However, as *Bannercraft* itself noted, "the bare existence of jurisdiction does not mean that appellees were entitled to the relief they were granted by the District Court." Slip opin. at 15. While *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), cannot be taken as mandating that such intervention is never warranted, it still has vitality as indicating that it is only in extraordinary circumstances that a court may, in the sound exercise of discretion, intervene to interrupt agency proceedings to dispose of a single, intermediate or collateral issue. A cogent showing of irreparable harm is an indispensable condition of such intervention. . . .

In the case at bar we do not have a cogent showing, indeed we do not see a substantial showing, of how *Sears* will be irreparably harmed in its participation in the unfair labor practice charge without the Advice and Appeals memoranda whose disclosure is still under judicial consideration. . . . [Supra at 3-4]

It is therefore, apparent that the instant case will not have significant precedential value.

CONCLUSION

WHEREFORE, it follows that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

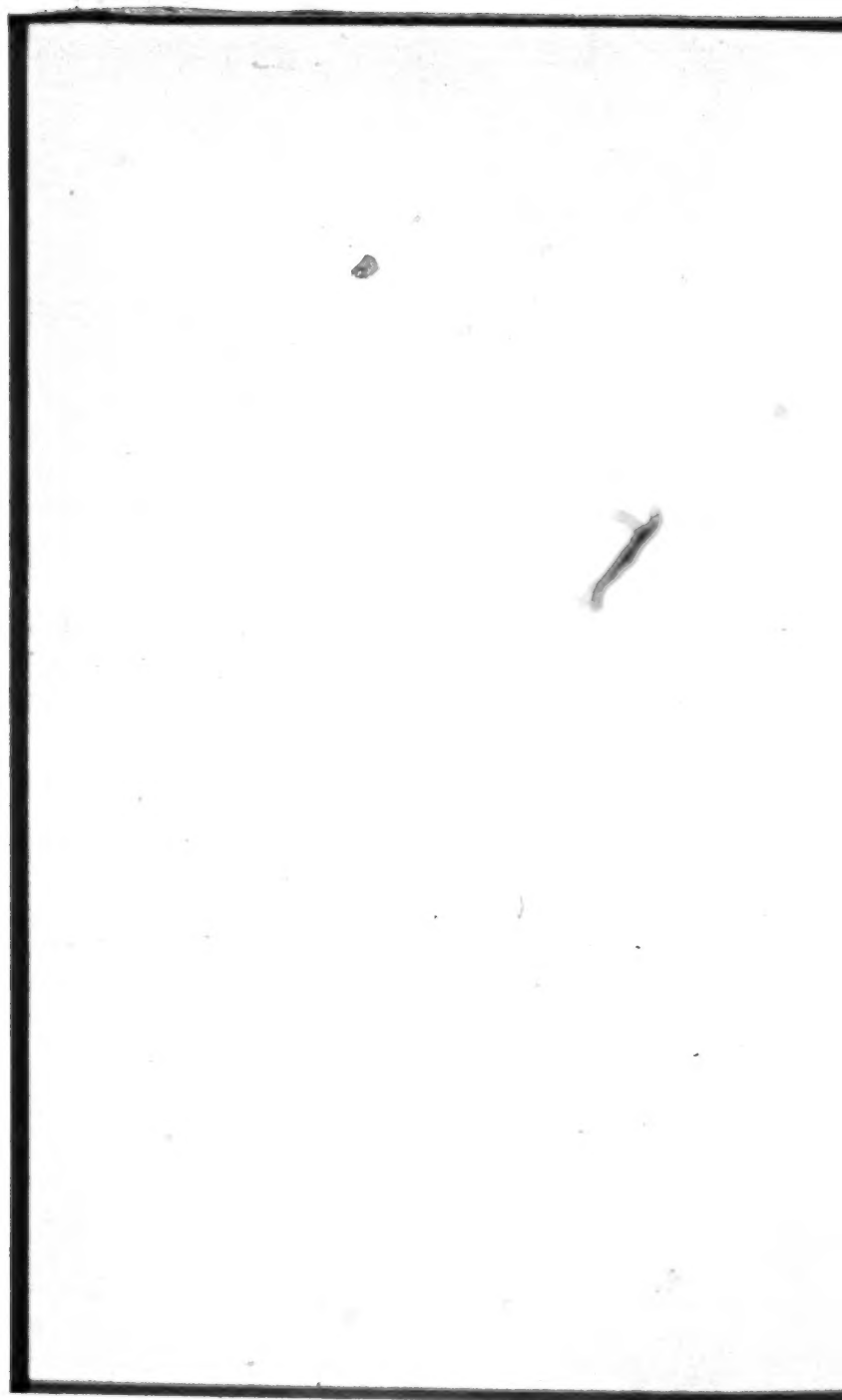
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DATED: January 3, 1973



MOTION

JAN 18 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,
Petitioner,
vs.

BANNERCRAFT CLOTHING COMPANY, INC., ASTRO
COMMUNICATION LABORATORY, A DIVISION OF
AIKEN INDUSTRIES, INC., DAVID G. LILLY
CO., INC.,

Respondent.

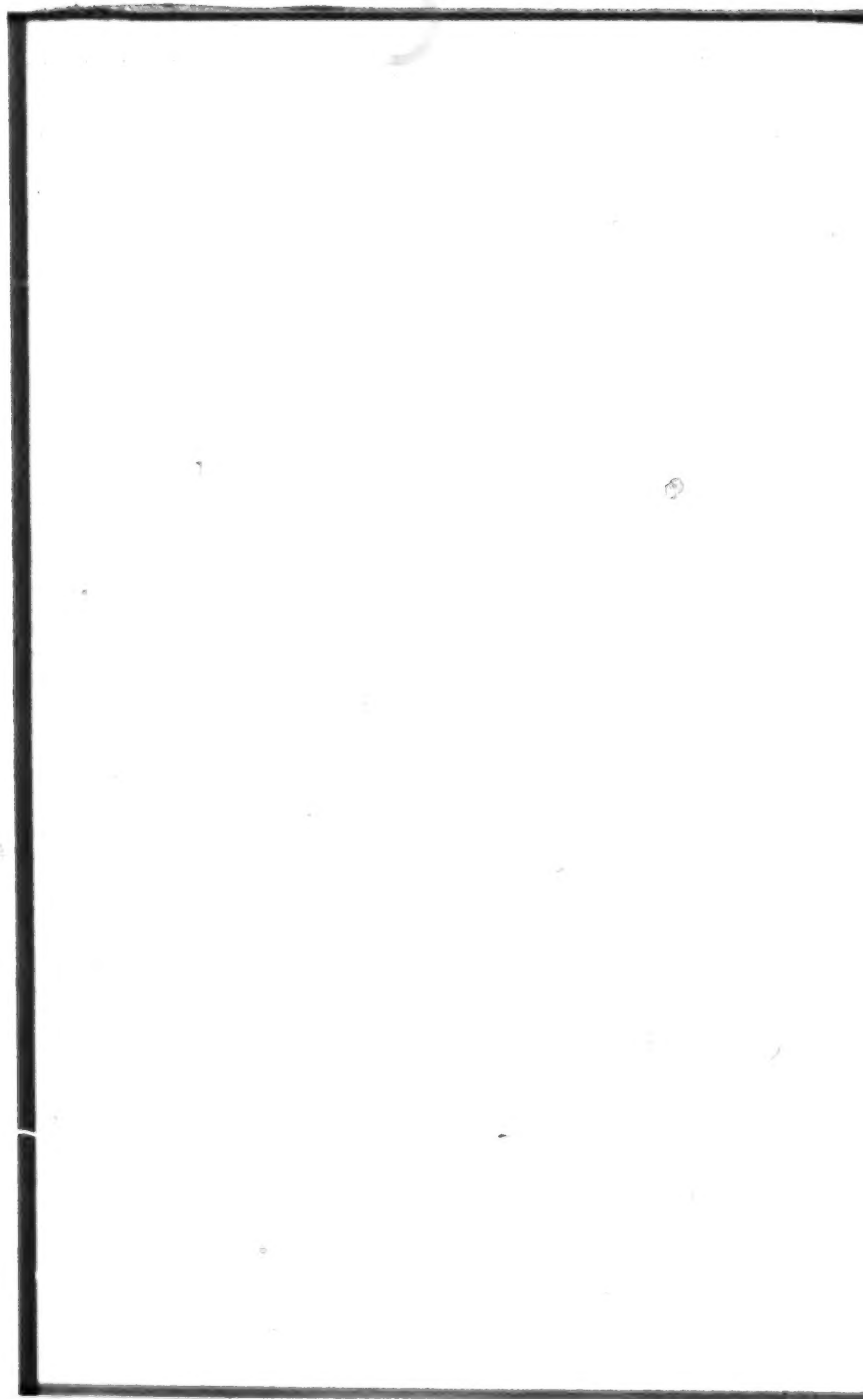
ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT
OF COLUMBIA CIRCUIT.

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE ON BEHALF OF SEARS, ROEBUCK AND
CO. AND BRIEF AMICUS CURIAE ON BE-
HALF OF SEARS, ROEBUCK AND CO.**

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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OF COLUMBIA CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE ON BEHALF OF SEARS, ROEBUCK AND CO.

Sears, Roebuck and Co. respectfully moves for leave to file a brief, as *amicus curiae*, in support of the petition for certiorari filed in this case by the Solicitor General. In support of this motion, Sears states:

1. Sears was recently the moving party in another action which involved a closely related situation. In *Sears, Roebuck and Co. v. N. L. R. B.*, _____ F. 2d _____, 81 LRRM 2481 (D. C. Cir. Oct 24, 1972), *pet. reh. pend.*, the District of Columbia Court of Appeals, after finding jurisdiction on the basis of its decision in the instant case, held that there was an insufficient showing of irreparable harm, notwithstanding the failure to provide public documents under the Freedom of Information Act, 5 U. S. C. § 551 *et seq.*, to warrant enjoining pending National Labor Relations Board proceedings. In effect, the court, in contrast to the Solicitor General's assertion in the instant petition

(p. 9) that Renegotiation Board and N. L. R. B. proceedings are identical for purposes of the issues here involved, carved out an exception to its decision in the present case for Labor Board matters; the irreparable harm determination in *Sears* is a virtually insurmountable barrier to forestalling determinative N. L. R. B. action until relevant information, which is required to be made available under the Act, is provided. If *Sears* is granted leave to file a brief, it will seek to show why, in order to resolve all aspects of the question here presented, this Court should determine the present case in conjunction with *Sears*.

2. *Sears* was also the plaintiff—the party seeking documents from the government under the Freedom of Information Act—in *Sears, Roebuck and Co. v. N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970). The Solicitor General has asserted that the Sixth Circuit's opinion in that case directly conflicts with the decision below in the present case. Pet. for Cert., pp. 8-9. If *Sears* is granted leave to file a brief, it will seek to show why, although it disagrees with this asserted conflict, the issue presented in both cases is nevertheless one which warrants review by this Court.

For the foregoing reasons, *Sears* respectfully requests leave to present its views.

Respectfully submitted,

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*Attorneys for Sears, Roebuck
and Co.*

IN THE
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
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**BRIEF AMICUS CURIAE ON BEHALF OF SEARS,
 ROEBUCK AND CO.**

This brief *amicus curiae* is filed on behalf of Sears, Roebuck and Co. contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE.

The interest of Sears is set forth in its annexed motion for leave to file a brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT.

1. Sears agrees with the Solicitor General that the question here presented is an important one which warrants review by this Court. The Freedom of Information Act was intended, through a "liberal disclosure requirement," to "increase the citizen's access to government records." Both the failure to provide access at a meaningful date, as well as the failure to provide access altogether, may frustrate this objective. Proceedings under the Act, accordingly, are required to be "expedited in every way." 5 U. S. C. § 552(a)(3). Nevertheless, one of the major impediments to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies.² This was the problem the court below confronted in the instant case. It recognized that, in the normal instance where an agency is required to make information available, it will do so with reasonable dispatch. Where, however, as the result of a dispute over the Act's coverage or for other reasons, information is not made promptly available, since such information is "likely to be a perishable commodity", any significant delay "may result in substantive damage to the plaintiff's case" and render the information sought "totally useless."³ Even where this result occurs, there is, of course, no automatic right to equitable relief. There must always be a careful balancing of all interests. The only issue here involved,

1. See, e.g., *Getman v. N. L. R. B.*, 450 F. 2d 670, 672 (D. C. Cir. 1971); *Tennessean Newspapers, Inc. v. Federal Housing Admin.*, 464 F. 2d 657 (6th Cir. 1972); *Bristol-Myers Company v. F. T. C.*, 424 F. 2d 935, 938 (D. C. Cir. 1970), *cert. den.*, 400 U. S. 824 (1970); and *Hawkes v. I. R. S.*, 467 F. 2d 787, 791 (6th Cir. 1972).

2. *Administration of the Freedom of Information Act*, H. R. Rep. No. 92-1419, 92d Cong. 2d Sess. (Sept. 20, 1972), pp. 10, 74 and 82-3.

3. *Id.* at 74.

however, is whether, where there has been the requisite showing of irreparable injury, probable success on the merits and absence of countervailing considerations, a district court may then invoke its power to issue all writs necessary to effectuate its jurisdiction⁴ to achieve a " 'common sense solution' . . . to 'do complete justice . . .'" *Morrow v. District of Columbia*, 417 F. 2d 728, 738 (D. C. Cir. 1969). In order to avoid a severe dislocation in the effectuation of the purposes of the Freedom of Information Act, it is submitted, this Court should affirm that the federal judiciary does, in fact, have this equitable authority.

2. The Sixth Circuit's decision in *Sears, Roebuck and Co. v. N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970), is not to the contrary. In that case, the court found that "the form of relief which the plaintiff seeks would result in early judicial review of a Board decision on permissible discovery, not an order to produce records." 433 F. 2d at 211. The instant case, by contrast, does not involve any attempt to review administrative decisional processes. Similarly, in *Sears, Roebuck and Co. v. N. L. R. B.*, _____ F. 2d _____, 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.*, where the issue was whether N. L. R. B. proceedings should be enjoined until the Board disclosed information sought by a charging party to permit his more effective participation in his own pending unfair labor practice case, there was no effort to obtain an appellate ruling as to the merits of any ruling by the Board. The issue in both instances was limited to the obligation to provide information under the Freedom of Information Act; enjoining administrative processes was only a necessary ancillary means to permit that question to be resolved in a meaning-

4. See, e.g., the authorities noted by the court below at App. A of the Petition, pp. 14a-15a; *Eastern Greyhound Lines v. Fusco*, 310 F. 2d 632, 634 (6th Cir. 1962); *Morrow v. District of Columbia*, 417 F. 2d 728, 737-738 (D. C. Cir. 1969); and *Nader v. Volpe*, 466 F. 2d 261, 269 (D. C. Cir. 1972) and the cases therein at n. 54.

ful context. In such a case, it is submitted, the controlling precedent is *Skinner & Eddy Corp. v. United States*, 249 U. S. 557 (1919), where district courts were held to have jurisdiction to restrain agency action where, *inter alia*, there is "no effective way of presenting the claim of invalidity at a later date." (emphasis added.) See also *Jewel Companies, Inc. v. F. T. C.*, 432 F. 2d 1155 (7th Cir. 1970).

3. The present Sears case presents an important aspect of the jurisdictional issue raised in *Bannerkraft*: what showing of irreparable injury to a plaintiff is required under the Freedom of Information Act to warrant enjoining administrative proceedings. If the standard is that of the traditional injunction case, the impact of the present case will be severely restricted. The denial of the right to prompt disclosure must, as a matter of law, be deemed to constitute an irreparable injury. In such a situation, where there is no countervailing harm to other interests, issuance of a preliminary injunction is the appropriate and, in fact, the only means available to enforce a significant statutory right. Cf. *Gomez v. Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The irreparable harm issue in *Sears*, in short, is, in view of the acknowledged absence of material difference between Renegotiation Board and N. L. R. B. proceedings (*pet. for cert.*, p. 9), inseparable from the *Bannerkraft* jurisdictional issue. It is for this reason that, in the event its request for rehearing is denied, Sears intends to seek certiorari from this Court and will also move to consolidate that petition with the instant petition. It is for that reason also, as well as to afford the Court with a desirable vehicle to consider all aspects of the question presented, that Sears respectfully suggests that consideration of the instant petition be deferred until such time as the District of Columbia Court of Appeals resolves the request for rehearing in *Sears* and,

should that decision be adverse, there is an opportunity to submit a petition for certiorari therefrom. See *Red Lion Broadcasting Co. v. F. C. C.*, 390 U. S. 916 (1968).

CONCLUSION.

For each of the foregoing reasons Sears respectfully requests that this Court grant the Petition for Certiorari or, in the alternative, defer consideration of the instant petition pending resolution of Sears' Petition for Rehearing before the District of Columbia Court of Appeals in *Sears, Roebuck and Co., v. N. L. R. B.*, *supra*.

Respectfully submitted,

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and Co.*

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SUPREME COURT, U. S.

APPENDIX

FEB 23 1973

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, PETITIONER

v.

BANNERCRAFT CLOTHING COMPANY, INC., ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**PETITION FOR A WRIT OF CERTIORARI FILED
DECEMBER 4, 1972
CERTIORARI GRANTED JANUARY 23, 1973**

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* The district courts orders are reproduced as an appendix to the petition for certiorari, Pet. App. 45a-60a. The decision of the Court of Appeals is reproduced at Pet. App. 1a-44a.

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ASTRO COMMUNICATION LABORATORY

RELEVANT DOCKET ENTRIES

- 1970**
- 8-12 Complaint; Motion for Preliminary Injunction filed**
- 8-18 Opposition to Motion for Preliminary Injunction filed**
- 8-21 Order enjoining further renegotiation proceedings entered**
- 9-29 Notice of appeal filed**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASTRO COMMUNICATION LABORATORY,
A Division of Aiken Industries,
Inc.

9125 Gaither Road
Gaithersburg, Maryland,

PLAINTIFF,

Civil Action
No. 2403-70

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

COMPLAINT FOR INJUNCTION

(Pursuant to Public Law 90-23; 81 Stat. 54)

Plaintiff alleges:

1. Plaintiff is a Division of Aiken Industries, and has its principal offices in Gaithersburg, Maryland. Aiken Industries is a corporation, with its principal offices in New York City, New York. As of September 30, 1967, the end of the fiscal year here in issue, Plaintiff was a subsidiary corporation of Keltec Industries. Defendant is an agency of the United States of America, with its principal or "statutory" office in the District of Columbia. All of the documents sought by this action are physically situated at Defendant's offices in the District of Columbia. Jurisdiction is conferred on this court by 28 U.S.C. 1331 and 5 U.S.C. 552(a)(3).

2. Plaintiff brings this action to enjoin Defendant, its servants, agents, employees, and attorneys from withholding documents Plaintiff is rightfully entitled to under 5 U.S.C. 552 and further to temporarily restrain Defendant, its servants, agents, employees, and attorneys from conducting any further proceedings in connection with the renegotiation of Plaintiff's Fiscal Year 1967 until further order of this Court. By letter dated April 20, 1970, a copy of which is attached hereto as Exhibit A, Plaintiff requested that Defendant produce or otherwise make available for inspection and copying documents of five different classes, including:

(a) Documents forming a part of the Renegotiation

Report prepared in accordance with ¶ 1472.3(d) of the Renegotiation Board Regulations:

(b) Documents in the possession of the Defendant which relate to or analyze certain expenses of Plaintiff which had been disallowed or adjusted by Defendant in its Report of Renegotiation and Addendum No. 1 to the Report of Renegotiation issued to Plaintiff;

(c) Documents which constitute or relate to the "Information Received" which is stated under paragraph 2 of page 1 of Addendum No. 1 to the Report of Renegotiation and which is dated March 9, 1970, a copy of which is attached hereto as Exhibit B;

(d) Documents in the possession of Defendant which explain or relate to the denial made by Defendant in a letter dated May 20, 1969, a copy of which is attached as Exhibit C, denying the request of Plaintiff to file untimely an Application for Commercial Exemption; and

(e) To the extent not covered by paragraphs (a)-(d) above, documents in possession of Defendant which relate to the renegotiation of Plaintiff for the fiscal year in issue.

3. At a meeting with the Renegotiator in May 1970, Plaintiff was informed that the Eastern Regional Renegotiation Board had made a tentative determination that Plaintiff had realized excessive profits in the amount of \$225,000. Plaintiff was also informed at that meeting that a hearing before the Eastern Regional Renegotiation Board had been scheduled for June 12, 1970.

4. In a letter dated April 17, 1970, Plaintiff had requested that Defendant postpone any hearing before the Eastern Regional Renegotiation Board until Plaintiff's request for production under 5 U.S.C. 552 had been complied with. As of June 10, 1970, Plaintiff had received no information from Defendant relating to continuance of the hearing which Defendant had scheduled for June 12, 1970. Therefore, on June 10, 1970, Plaintiff again wrote a letter to Defendant requesting a continuance of this hearing. By telephone call on June 11, 1970, Defendant agreed to postpone the hearing before the Eastern Regional Renegotiation Board.

5. By letter dated July 21, 1970, Defendant's General Counsel denied *in toto* Plaintiff's request for production of

documents under 5 U.S.C. 552. A copy of this letter is attached hereto as Exhibit D.

6. By letter dated July 30, 1970, Defendant affirmed the action of its General Counsel in denying in its entirety Plaintiff's request for production of documents pursuant to 5 U.S.C. 552.

7. By letter dated July 31, 1970, Plaintiff was informed that the hearing before the Eastern Regional Renegotiation Board, which had originally been scheduled for June 12, 1970, was scheduled for August 17, 1970. The letter further states "If this date is not convenient for you, please inform me as to which earlier date might be satisfactory."

8. By letter dated August 5, 1970, Plaintiff requested a continuance from the August 17 hearing date. Defendant thereupon rescheduled the hearing for August 24, 1970.

9. Plaintiff has been caused, and continues to be caused, irreparable injury by Defendant's wrongful failure to make available the records of Defendant referred to in paragraph 2 above and by Defendant's insistence that the renegotiation of Plaintiff's Fiscal Year 1967 proceed without Plaintiff having access to the records in question, which are essential for it to receive a due process hearing before both the Eastern Regional Renegotiation Board and The Renegotiation Board.

WHEREFORE, Plaintiff prays that:

(a) Defendant, its agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from conducting any further proceedings in connection with the renegotiation of Plaintiff's Fiscal Year 1967 until further order of this court.

(b) Defendant, its agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from withholding the documents specified in paragraph 2 above and in Exhibit A attached hereto, and be ordered to produce said documents for inspection and copying by Plaintiff.

(c) The court order such other and further relief as may be just and equitable.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

/s/ James J. Gallagher
JAMES J. GALLAGHER
Attorneys for Plaintiff
Sellers, Connors & Cuneo
1625 K Street, N. W.
Washington, D. C. 20006
Tel. 347-0777

DATED: August 11, 1970

April 20, 1970

Mr. Nathan Bass
Secretary to the Board
The Renegotiation Board
1910 K Street, N.W.
Washington, D.C. 20446

REGISTERED MAIL
RETURN RECEIPT
REQUESTED

Re: Astro Communication Laboratory
FYE September 30, 1967
Assignment No. 89874-67-B

Dear Sir:

In accordance with 5 U.S.C. 552, the undersigned hereby requests and demands production for inspection and copying, and copying for the undersigned, at rates prescribed by Section 1480.12 of the Renegotiation Board Regulations, the following documents:

1. All documents, parts, provisions, and writings of every kind whatsoever constituting and forming a part of the Renegotiation Report for the above-captioned fiscal year of Astro Communications Laboratory, prepared in accordance with Paragraph 1472.3(d) of the Renegotiation Board Regulations.

2. All documents in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board of the captioned fiscal year of Astro Communications Laboratory, which documents analyze, summarize, discuss, relate to, or in any way bear upon Astro Communications' treatment, recording, reporting, control, or allocation of selling expenses including selling commission expense, advertising expense, operating loss carry-forwards, and corporate management fees.

3. To the extent not already covered hereinabove, all documents of every kind whatsoever in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board which constitute, comprise, relate to, bear upon, or discuss the "Information received" which is referred to in the first line under paragraph 2 of Addendum #1, dated March 9, 1970, which was sent to Astro Communications Laboratory by the Eastern Regional Renegotiation Board.

4. All documents of every kind whatsoever in the file

of the Renegotiation Board or in the file of the Eastern Regional Renegotiation Board which relate to, bear upon, discuss or explain the reasons for the order of the Renegotiation Board made on May 20, 1969 denying the request filed by Astro Communications Laboratory to file an untimely Application for Commercial Exemption.

5. To the extent not already covered hereinabove, all records, analyses, determinations, opinions, reports, or summaries containing, relating to, or bearing upon the renegotiation of Astro Communications Laboratory for the captioned fiscal year to the extent that such documents have been generated by and are in the custody of either the Eastern Regional Renegotiation Board or the Renegotiation Board.

The expeditious production of all the foregoing documents is absolutely necessary in order to enable Astro Communications Laboratory reasonably to continue the conduct of renegotiation before the Eastern Regional Renegotiation Board for the subject fiscal year.

It is requested that the documents identified herein be produced and copied for the undersigned as prescribed by the statute, complete in every respect and without omission of any portion or part thereof, except for deletions reasonably required by the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, No. 22,635, decided on March 10, 1970.

The undersigned is willing, in advance of or at the time of receipt of the documents requested herein, to pay such fees for these documents as have been prescribed by Section 1480.12 of the Renegotiation Board Regulations.

If for any reason whatsoever the production of the documents requested herein, or any portion thereof, is determined by the General Counsel of the Renegotiation Board to be unallowable in accordance with Section 1480.7(d), or for any other reason is not allowed, made, and accomplished within a reasonable time from the request and demand herein, this request and demand shall constitute a request for review by the Renegotiation Board of the denial and disallowance in accordance with Section 1480.7(e) of the Renegotiation Board Regulations, and this letter shall be deemed to constitute a request for review pursuant to such regulation.

It is hereby requested that you communicate at your earliest convenience with the undersigned, indicating the total fees which will be charged for the production of the documents herein requested and the extent of time which will be necessary for this production.

Very truly yours,

HERBERT L. FENSTER

April 17, 1970

**Eastern Regional
Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20447**

ATTENTION: Mr. Ray Johnson

**Re: Renegotiation FYE September 30,
1967**

Assignment No. 89874-67-B

Gentlemen:

This firm and the undersigned represent Astro Communication Laboratory and Aiken Industries, Inc., in connection with the subject renegotiation matter.

This will confirm a telephone conversation of April 16, 1970, with Mr. Ray Johnson of the Eastern Regional Renegotiation Board. In accordance with paragraphs 1472.3(f), the contractor requests a renegotiation conference. Further, in accordance with paragraph 1472.3(h), the contractor requests a panel meeting to be held at a date after the renegotiation conference.

Under separate letter to Mr. Nathan Bass, Secretary, Renegotiation Board, appellant has, in accordance with 5 U.S.C. 552, requested certain documents and information relating to the subject renegotiation case. Since the contractor believes that the furnishing of these documents by the Renegotiation Board will have a material bearing upon the continued conduct of the proceedings before the Eastern Regional Renegotiation Board, the contractor hereby requests that the renegotiation conference and the panel meeting both be postponed until the requested documents are received and analyzed by the contractor.

**Very truly yours,
HERBERT L. FENSTER**

**cc: Mr. Woodbury
Mr. Rasavage
Mr. Marantis**

HLF:clw

June 10, 1970

Eastern Regional Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20447

Re: Renegotiation, Fiscal Year Ended
September 30, 1967
Assignment No. 89874-67-B

Gentlemen:

This firm and the undersigned represent Astro Communication Laboratory and Aiken Industries, Inc. in connection with the subject renegotiation matter.

Approximately six weeks ago, we sent a letter to the Secretary of the Renegotiation Board requesting the production for inspection and copying of certain documents in accordance with 5 U.S.C. 552. In our letter, dated April 17, 1970, we requested that the panel meeting before the Eastern Regional Renegotiation Board be postponed until the requested documents were received and analyzed by the contractor. We have received no response to our request for production under 5 U.S.C. 552, nor have we received any acknowledgment of our request for postponement of the panel meeting.

Therefore, we again request that the panel meeting, now scheduled to be held on June 12, 1970, be postponed until such time as the Renegotiation Board has responded to our request for production under 5 U.S.C. 552. (See *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, No. 22635, Decided on March 10, 1970; *Bannercraft Clothing Company v. The Renegotiation Board*, Civil Action No. 1340-70, Preliminary Injunction dated May 15, 1970; and *Holly Corporation*, Renegotiation, Fiscal Years 1962-1964.)

Sincerely yours,

JAMES J. GALLAGHER

Jul 30, 1970

Herbert L. Fenster, Esq.
Messrs. Sellers, Conner & Cuneo
1625 K Street, NW
Washington, D.C. 20006

Re: Astro Communication Laboratory
FYE September 30, 1967
Assignment No. 89874-67-B

Dear Mr. Fenster:

This is in response to your letter dated April 20, 1970, requesting access on behalf of Astro Communication Laboratory to records of the Board, pursuant to 5 U.S.C. 552. Your letter was referred to me in accordance with RBR 1480.7(b).

I have concluded as follows with respect to the items set forth in your request:

Item 1

All documents, parts, provisions, and writings of every kind whatsoever constituting and forming a part of the Renegotiation Report for the above-captioned fiscal year of Astro Communications Laboratory, prepared in accordance with Paragraph 1472.3(d) of the Renegotiation Board Regulations.

The records of the Board show that a copy of the accounting section of the Report of Renegotiation was furnished to the contractor on August 28, 1969, upon its request, pursuant to RBR 1472.3(d). In my opinion, the remainder of that report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 2

All documents in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board of the captioned fiscal year of Astro Communications Laboratory, which documents analyze, summarize, discuss, relate to, or in any way bear upon Astro Communications' treatment, recording, reporting, control,

or allocation of selling expenses including selling commission expense, advertising expense, operating loss carry-forwards, and corporate management fees.

Item 3

To the extent not already covered hereinabove, all documents of every kind whatsoever in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board which constitute, comprise, relate to, bear upon, or discuss the "Information received" which is referred to in the first line under paragraph 2 of Addendum #1, dated March 9, 1970, which was sent to Astro Communications Laboratory by the Eastern Regional Renegotiation Board.

Item 5

To the extent not already covered hereinabove, all records, analyses, determinations, opinions, reports, or summaries containing, relating to, or bearing upon the renegotiation of Astro Communications Laboratory for the captioned fiscal year to the extent that such documents have been generated by and are in the custody of either the Eastern Regional Renegotiation Board or the Renegotiation Board.

RBR 1480.6(b) provides that a person who requests access to a record of the Board pursuant to 5 U.S.C. 552 (a)(3) must provide a reasonably specific description of the particular record sought, and that the Board will not comply with a request that does not provide a sufficient description, or with a general or blanket request.

In my opinion, you have not, in Items 2, 3 and 5 of your letter, provided reasonably adequate descriptions of particular records. Further, in my opinion, any such records are within the exemptions provided in 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7). In addition, Part 1A of the Report of Renegotiation sets forth the expenses referred to in Items 2 and 3, as reported by the contractor in its renegotiation filing for 1967, together with the adjustments made by the regional board.

Item 4

All documents of every kind whatsoever in the file of

the Renegotiation Board or in the file of the Eastern Regional Renegotiation Board which relate to, bear upon, discuss or explain the reasons for the order of the Renegotiation Board made on May 20, 1969 denying the request filed by Astro Communications Laboratory to file an untimely Application for Commercial Exemption.

In my opinion, the records sought in this item are exempt under 5 U.S.C. 552(b)(3), (4) and (5) and RBR 1480.9 (a)(3), (4) and (5).

RBR 1480.7(e) provides that you may obtain a review of this decision by the Renegotiation Board by filing a request therefor, within 20 days after the date of this letter. Your letter of April 20, 1970 states:

If for any reason whatsoever the production of the documents requested herein, *or any portion thereof*, is determined by the General Counsel of the Renegotiation Board to be unallowable in accordance with Section 1480.7(d), * * * this request and demand shall constitute a request for review by the Renegotiation Board of the denial and disallowance in accordance with Section 1480.7(e) of the Renegotiation Board Regulations, and this letter shall be deemed to constitute a request for review pursuant to such regulation.

Accordingly, having concluded that you are not entitled under 5 U.S.C. 552 to access to records of the Board in accordance with the items of your request, I have referred this decision to the Board for review.

Very truly yours,

/s/ Howard W. Fensterstock
HOWARD W. FENSTERSTOCK
General Counsel

Jul 30, 1970

Herbert L. Fenster, Esq.
Messrs. Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: Astro Communication Laboratory
FYE September 30, 1967
Assignment No. 89874-67-B

Dear Mr. Fenster:

In accordance with your letter dated April 20, 1970, and RBB 1480.7(e), the Board has reviewed the action of its General Counsel, as set forth in his letter of July 21, 1970 to you, denying your request on behalf of Astro Communication Laboratory for access to records of the Board pursuant to 5 U.S.C. 552.

As a result of such review, the Board has approved the action of the General Counsel. Your request is denied, to the extent and for the reasons set forth in his letter.

Very truly yours,

/s/ Nathan Bass
NATHAN BASS
Secretary to the Board

EASTERN REGIONAL RENEGOTIATION BOARD

**1325 K Street, NW.
Washington, D.C. 20447**

Aug 6, 1970

**Mr. James J. Gallagher
Sellers, Conner & Cuneo
Attorneys and Counselors
Commonwealth Building
1625 K Street, N.W.
Washington, D.C. 20006**

**Subject: Astro Communication Laboratory
Assignment No. 89874-67-B
FYE: September 30, 1967**

Dear Mr. Gallagher:

Confirming our telephone conversation of August 6, 1970. The Panel Meeting for Astro Communication Laboratory originally scheduled for August 17, 1970, has been postponed until August 24, 1970. This meeting will be held at the Eastern Regional Renegotiation Board, 1325 K Street, N. W., at 1:30 p.m.

Very truly yours,

**/s/ Frank S. Howell
FRANK S. HOWELL
Board Member**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASTRO COMMUNICATION LABORATORY,
A Division of Aiken Industries,
Inc.,

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No. 2403-70

MOTION FOR PRELIMINARY INJUNCTION

To: Defendant, The Renegotiation Board, and its Attorneys.

Plaintiff moves the court for a Preliminary Injunction enjoining Defendant, their agents, servants and employees, including those of Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, or in any way acting upon the renegotiation of Plaintiff for Plaintiff's Fiscal Year 1967, pending the final decision of this court on Plaintiff's Complaint, on the grounds that:

1. Continuation of renegotiation proceedings without the availability to Plaintiff of the documents specified in paragraph 2 of its Complaint would cause Plaintiff to be unable adequately, reasonably, or fairly to present its position in such renegotiation proceedings, and would result in determinations by Defendant which were unfair, inequitable, invalid, and confiscatory. Such determinations without an opportunity for Plaintiff to inspect such documents would deny Plaintiff due process of law in the pending renegotiation proceedings.

2. The production for Plaintiff's inspection of the documents specified in Paragraph 2 of Plaintiff's Complaint is absolutely essential to the conduct of renegotiation for Plaintiff's Fiscal Year 1967, or Plaintiff will be effectively denied any reasonable administrative remedy and procedure as contemplated by The Renegotiation Act of 1951, 50 App. U. S. Code 1210, *et seq.*

3. Defendant is unreasonably and wrongfully withhold-
ing production of the documents requested by Plaintiff.

4. The granting of a Preliminary Injunction herein will not cause undue delay or loss to Defendant, but will prevent irreparable injury to Plaintiff.

This motion will be based on this notice of motion, on the affidavit of Ken Shen, and all of the other pleadings and papers on file in this action.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

/s/ James J. Gallagher
JAMES J. GALLAGHER

Attorneys for Plaintiff

Sellers, Conner & Cuneo
1625 K Street, N. W.
Washington, D. C. 20006
Tel. 347-0777

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ASTRO COMMUNICATION LABORATORY,
A Division of Aiken Industries, Inc.
9125 Gaither Road
Gaithersburg, Maryland,

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action No.
2403-70

AFFIDAVIT OF KEN SHEN

I, KEN SHEN, having been first duly sworn, now depose and say that:

1. I am President of Astro Communication Laboratory, which is a division of Aiken Industries, Inc. At the end of the fiscal year which is the subject of the renegotiation proceeding here in issue, Astro Communication Laboratory was a subsidiary of Keltec Industries. I was President of Astro Communication Laboratory at that time, also. I am thoroughly familiar with the company's records relating to renegotiation and with the actions and activities of the Plaintiff and the Renegotiation Board in connection with the renegotiation of Plaintiff's Fiscal Year 1967.

2. In accordance with the Renegotiation Act of 1951, Plaintiff timely filed the Standard Form of Contractor's Report for Renegotiation (otherwise designated "RB Form 1") for its Fiscal Year 1967.

3. On April 20, 1970, Plaintiff sent a letter to the Secretary of the Renegotiation Board requesting the production for inspection and copying, in accordance with 5 U.S.C. § 552 (the Public Information Act Amendment), of certain documents. A copy of this letter is attached to the Complaint filed herein as Exhibit A.

4. At a meeting with a representative of the Renegotiation Board in May 1970, Plaintiff was informed that the Eastern Regional Renegotiation Board had made a tentative determination that Plaintiff had realized excessive profits of \$225,000 in its Fiscal Year 1967.

5. By letter dated July 21, 1970, the General Counsel of the Renegotiation Board, Howard W. Fensterstock, denied each and every request for documents contained in Plaintiff's letter of April 20, 1970.

6. By letter dated July 30, 1970, the Renegotiation Board approved the action of its General Counsel and affirmed the denial of Plaintiff's request for documents.

7. On August 3, 1970, Plaintiff received a letter from the Eastern Regional Renegotiation Board informing it that a hearing had been scheduled before that Board on August 17, 1970. The letter further stated that if that date was inconvenient for the Plaintiff, it could request a hearing on any earlier date.

8. Plaintiff's counsel had a prior commitment outside the Washington, D. C. area on August 17, 1970. Plaintiff requested that the hearing before the Eastern Regional Renegotiation Board be continued to the week of August 24, 1970. By telephone call on August 6, 1970, and letter dated the same day, that request was granted and the hearing was re-scheduled for August 24, 1970.

9. It reasonably appears that the Eastern Regional Renegotiation Board relied materially upon documents in its possession, including remaining portions of its "Report," which were not made available to plaintiff, in reaching its tentative determination of excessive profits. Plaintiff has been unable to respond to the information contained therein, which information appears to be erroneous, inaccurate or misleading, and Plaintiff has therefore been, and continues to be, unable reasonably to avail itself of the administrative proceeding established by Defendant.

10. In the absence of an adequate administrative remedy, and upon a determination of excessive profits by the Eastern Regional Renegotiation Board and thereafter by the Renegotiation Board, Plaintiff will have no reasonable recourse than to pay any amounts determined or to make very substantial partial payments against such amounts and incur substantial interest costs on the remainder, pending any review (as provided by the Renegotiation Act of 1951) by the Tax Court of the United States. Such events would cause Plaintiff irreparable damage.

DISTRICT OF COLUMBIA ss

Sworn and subscribed to before me this 11th day of August 1970.

**/s/ Irene L. Jarvis
Notary Public**

My Commission Expires Aug. 31, 1970

BANNERCRAFT CLOTHING COMPANY

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DISTRICT OF COLUMBIA

Filed and submitted to the Clerk of the District Court of the District of Columbia on August 1970.

Attest: In Witness Whereof
Notary Public

My Commission Expires Aug 31, 1970

17

DAKINERST CLOTHING COMPANY

BANNERCRAFT CLOTHING COMPANY

RELEVANT DOCKET ENTRIES

1970

- 5- 1 Complaint; Application for Temporary Restraining Order; Motion for Preliminary Injunction filed**
- 5- 5 Motion of Defendant to Dismiss and in Opposition to Plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction filed**
- 5- 6 Order denying motion to dismiss**
- 5- 6 Order granting motion for temporary restraining order**
- 5-15 Order granting motion for preliminary injunction**
- 7-10 Notice of appeal from order of 5-15-70 filed**
- 8- 4 Motion to dissolve preliminary injunction filed**
- 8-10 Opposition to Motion to dissolve preliminary injunction**
- 8-13 Order denying Motion to dissolve preliminary injunction**
- 8-28 Notice of appeal from order of 8-13-70 filed**

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BANNERCRAFT CLOTHING COMPANY, INC.

1234 Carpenter Street

Philadelphia, Pennsylvania 19147,

PLAINTIFF,

v.

THE RENEGOTIATION BOARD

1910 K Street, N. W.

Washington, D. C. 20006,

DEFENDANT.

Civil Action

No. 1340-70

COMPLAINT FOR INJUNCTION

(Pursuant to Public Law 90-23; 81 Stat. 54)

Plaintiff alleges:

1. Plaintiff is a corporation with its principal offices in Philadelphia, Pennsylvania. Defendant is an agency of the United States of America, with its principal or "statutory" office in the District of Columbia. All of the documents sought by this action are physically situated at Defendant's offices in the District of Columbia. Jurisdiction is conferred on this Court by 28 U.S.C. 1331 and 5 U.S.C. 552(a)(3).

2. Plaintiff brings this action to temporarily restrain Defendant, their servants, agents, employees and attorneys from conducting any further proceedings in connection with the renegotiation of plaintiff's Fiscal Years 1966 and 1967 until further order of this Court and further to enjoin Defendant, their servants, agents, employees and attorneys from withholding documents Plaintiff is rightfully entitled to under 5 U.S.C. 552.

3. By letter dated February 20, 1970, a copy of which is attached hereto as Exhibit A, Plaintiff was notified by the Eastern Regional Renegotiation Board that a final recommendation had been made that for Plaintiff's Fiscal Year 1967, it had realized excessive profits of \$1,400,000.00. By letter dated November 25, 1969, Plaintiff was notified that the Eastern Regional Renegotiation Board had made a final determination of excessive profits in the amount of \$75,000 for Plaintiff's Fiscal Year 1966.

4. By letter dated February 24, 1970, a copy of which is attached hereto as Exhibit B, Plaintiff requested that it be furnished, pursuant to the Renegotiation Board's Regulations, a written summary of the facts and reasons upon which the Board's determination for Plaintiff's Fiscal Year 1967 was based.

5. The Eastern Regional Renegotiation Board responded to Plaintiff's request by letter dated March 2, 1970, a copy of which is attached hereto as Exhibit C, wherein Plaintiff was informed that its request was "defective" because it had not made the required statement to the effect that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings; and, therefore, the summary of facts and reasons would not be supplied until such time as the request was perfected.

6. Plaintiff replied to the Board's letter of March 2, 1970, by letter dated March 9, 1970, a copy of which is attached hereto as Exhibit D, wherein it is stated:

. . . The required statement is somewhat meaningless when we do not have a written statement of the issues upon which you have made your finding. However, to comply with the requirements of the regulations, the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Please send me the Summary of Facts and Reasons.

7. The Summary of Facts and Reasons for Fiscal Year 1967 was sent to Plaintiff by the Eastern Regional Renegotiation Board on March 16, 1970. That document indicated that of Plaintiff's total profits for renegotiation of \$1,739,000.00, Defendant had determined that \$1,400,000.00 constituted excessive profits.

8. By letter dated March 16, 1970, a copy of which is attached as Exhibit E, Plaintiff requested that Defendant produce or otherwise make available to inspection documents of six different classes, including:

(a) Interagency communications relating to Plaintiff's bidding, award and performance of its renegotiable contracts for the Fiscal Years 1966 and 1967.

(b) Investigatory reports prepared by the Board containing facts relevant to the Board's determination as to Plaintiff for its Fiscal Years 1966 and 1967.

(c) Opinions, orders, determinations and other docu-

ments generated by Defendant relating to eleven named companies for the years 1962 through 1968.

(d) The identification of those coat manufacturers with whom Plaintiff was compared, as was stated on page 4 of the Summary of Facts and Reasons for 1966.

(e) The "procurement information" described on page 4 of the Summary of Facts and Reasons for 1966, which the Board contends indicated there was a lack of effective price competition.

Plaintiff has never received a response to this request.

9. On April 10, 1970, Plaintiff met with representatives of Defendant. At the beginning of that meeting, Plaintiff requested that the meeting be stayed until Defendant determined what course it would follow pursuant to the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, No. 22,635, Decided March 10, 1970. Defendant denied Plaintiff's request and continued on with the meeting.

10. By letters dated April 29, 1970, copies of which are attached as Exhibits F and G, Plaintiff was informed that The Renegotiation Board had determined that Plaintiff had realized excessive profits of \$75,000 in 1966 and \$1,450,000 in 1967. This latter figure is \$50,000 larger than the amount determined by the Eastern Regional Renegotiation Board, yet not one word of explanation regarding this \$50,000 was offered by Defendant.

Plaintiff must inform Defendant prior to May 12, 1970, whether or not it will agree to Defendant's determinations. If Plaintiff does not agree, Defendant will issue a unilateral order providing for the payment to the Government of the entire amount determined to be excessive profits.

11. Plaintiff has been caused and continues to be caused irreparable injury by Defendant's refusal to stay the renegotiation proceedings for Plaintiff's Fiscal Years 1966 and 1967 and by Defendant's failure to make available the records of Defendant referred to in paragraph 8 above.

WHEREFORE, Plaintiff prays that:

(a) Defendant, their agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from conducting any further proceedings in connection with the renegotia-

tion of Plaintiff's Fiscal Years 1966 and 1967 until further order of this Court.

(b) Defendant, their agents, employees, servants and attorneys, including those of the Eastern Regional Renegotiation Board, be enjoined from withholding the documents specified in Paragraph 8 above, and in "Exhibit E" attached hereto, and be ordered to produce said documents for inspection and copying by Plaintiff.

(c) The Court order such other and further relief as may be just and equitable.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY
Attorney for Plaintiff

Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

ST 3-0600

EXHIBIT A

EASTERN REGIONAL RENEGOTIATION BOARD

**1325 K Street, N.W.
Washington, D.C. 20447**

**REGISTERED MAIL
RETURN RECEIPT REQUESTED**

Feb. 20, 1970

**Bannercraft Clothing Company, Inc.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147**

Reference: Case No. 83655-67-A

Gentlemen:

Pursuant to the provisions of Section 1472.3(i) of the Renegotiation Board Regulations, you are hereby notified by registered mail that, at a meeting held on February 16, 1970, the Eastern Regional Renegotiation Board made a final recommendation that during the fiscal year ended December 31, 1970, Bannercraft Clothing Company, Inc. realized excessive profits from contracts and subcontracts subject to the Renegotiation Act of 1951, as amended, in the amount of \$1,400,000. Such amount of excessive profits is subject to a proper adjustment on account of State taxes measured by income and to the tax credit to which the contractor may be entitled under Section 1481 of the Internal Revenue Code of 1954.

Please advise us not later than March 2, 1970 whether you wish to enter into a Renegotiation Agreement embodying the recommendation stated above.

**Very truly yours,
Eastern Regional Renegotiation Board
By Herbert G. Hart
HERBERT G. HART
Chairman**

**CC: Mr. William B. Downs
Tait, Weller & Baker
Mr. Richard H. Wathen, Esq.
Sellers, Conner & Cuneo**

EXHIBIT B

February 24, 1970

**Mr. Herbert G. Hart, Chairman
Eastern Regional Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20447**

Re: Case No. 83655-67-A

Dear Sir:

This will acknowledge receipt of your letter of February 20 to Bannercraft Clothing Company, Inc. concerning the above case. You are requested to furnish the contractor, pursuant to Section 1477.3 of the Regulations, a written summary of the facts and reasons upon which the determination was based to assist the contractor in determining whether it should enter into a Renegotiation Agreement. Prior to reviewing the summary of facts and reasons, it is not possible to state whether all relevant evidence has been submitted since we have never had in writing the basis upon which you made this determination.

Obviously, the contractor cannot advise you by March 2, 1970 whether it wishes to enter into a Renegotiation Agreement but, if that is the final date, the answer at this point must be in the negative.

Very truly yours,

ROBERT L. ACKERLY

RLA :js

cc: Mr. Mickey Bennett

EXHIBIT C

**EASTERN REGIONAL RENEGOTIATION BOARD
1325 K Street, N.W.
Washington, D.C. 20447**

Mar. 2, 1970

**Robert L. Ackerly, Esq.
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006**

**Subject: Bannercraft Clothing Company, Inc.
Case No. 83655-67-A
Fiscal year ended December 31, 1967**

Dear Mr. Ackerly:

Thank you for your letter of February 24, 1970 on behalf of Bannercraft Clothing Company, Inc. Your letter requests a Summary of Facts and Reasons pursuant to the provisions of RBR 1477.3. However, you do not make the statement required by the regulation that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Accordingly, your request for a summary is defective. In view of these circumstances, the contractor will be allowed an additional time, until March 9, 1970, to advise the Board whether it is willing to enter into a renegotiation agreement for the amount of excessive profits stated in the letter of February 20, or within which to perfect its request for a Summary of Facts and Reasons.

If the request for a Summary of Facts and Reasons under RBR 1477.3 is perfected, the contractor will be allowed a reasonable time after such summary is furnished to the contractor to decide whether it is willing to enter into a renegotiation agreement.

Very truly yours,

**/s/ Herbert G. Hart
HERBERT G. HART
Chairman**

CC: Bannercraft Clothing Company, Inc.

EXHIBIT D

March 9, 1970

Mr. Herbert G. Hart
Chairman
Eastern Regional Renegotiation Board
1325 K Street, N.W.
Washington, D.C. 20047

Re: Bannercraft Clothing Company, Inc.
Case No. 83655-67-A
Fiscal Year Ended December 31, 1967

Dear Mr. Hart:

This replies to your letter of March 2. Bannercraft Clothing Company, Inc. does wish to have a Summary of Facts and Reasons pursuant to the provisions of RBR 1477.3. You insist upon a statement that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Since this is a prerequisite to supplying the summary, we make this statement; however, it is without prejudice to an opportunity to offer evidence on the issues disclosed by the Summary of Facts and Reasons. The required statement is somewhat meaningless when we do not have a written statement of the issue upon which you have made your finding. However, to comply with the requirements of the regulations, the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceeding. Please send me the Summary of Facts and Reasons.

Very truly yours,
ROBERT L. ACKERLY

RLA:rmj

EXHIBIT E

SELLERS, CONNER & CUNEO
Formerly
CUMMINGS & SELLERS
Attorneys and Counselors
Commonwealth Building
1625 K Street, Northwest
Washington, D.C. 20006

March 16, 1970

Nathan Bass, Secretary
The Renegotiation Board
1910 K Street, N.W.
Washington, D.C.

Re: Bannercraft Clothing Company, Inc.
Fiscal Years 1966 and 1967

Dear Mr. Bass:

Pursuant to 5 U.S.C. § 552 and the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, No. 22,635, decided March 10, 1970, request is hereby made that you make available to the undersigned, as counsel for Bannercraft, the following records for the purpose of inspection and/or copying:

1. Interdepartmental and interagency communications between The Renegotiation Board and other Government agencies with respect to Bannercraft's bidding, award and performance of its renegotiable contracts for the fiscal years 1966 and 1967.

2. Investigatory or other factual reports prepared by employees of the Board containing facts which are relevant to the Board's determination as to Bannercraft's renegotiable contracts for the years 1966 and 1967.

3. The final opinions, determinations, unilateral orders, agreements, clearance notices, letters not to proceed, and the summaries of facts and reasons on which unilateral orders, agreements, or determinations are based for the years 1962 through 1968 for the following companies:

Hart-Schaeffer & Marx—Chicago
 Botany 500—Philadelphia
 M. Wile & Sons—Buffalo, New York
 Joseph H. Cohen & Sons—Philadelphia
 Pincus Brothers
 College Hall Fashions
 Gutman & Sons—Philadelphia
 Pembroke Clothing—Egg Harbor, New Jersey
 Hirst Tyler & Company—Philadelphia
 Amerson Clothing Company—Pleasantville,
 New Jersey
 Gramaton Clothing—Fort River, Massachusetts

4. The facts upon which The Renegotiation Board concluded that Bannercraft's pricing policy was unreasonable in 1966.

5. An identification of those coat manufacturers with whom Bannercraft's available cost of production was compared as stated on page 4 of the Summary of Facts and Reasons for 1966, and with respect to each such manufacturer, deleting therefrom where necessary, such identification in the data as may be required, the same data described in paragraph 3 above.

6. The "procurement information" described on page 4 of the Summary of Facts and Reasons for 1966 which was reviewed and which the Board contends indicated that there was a lack of effective price competition. It is requested that this data be made available in detail and, to the extent that it may be included in requests heretofore stated, that it be identified as the data upon which the Board reached the conclusion that there was a lack of effective price competition.

As soon as these documents can be made available, I would appreciate your notifying me so I can make prompt and appropriate arrangements to inspect and copy these documents.

Very truly yours,

/s/ Robert L. Ackerly
 ROBERT L. ACKERLY

RLA:js

bc: Mr. Mickey Bennett
 Mr. William B. Downes

EXHIBIT F

**THE RENEGOTIATION BOARD
Washington, D.C. 20446**

**REGISTERED-RETURN
RECEIPT REQUESTED**

Apr. 29, 1970

**Bannercraft Clothing Company, Inc.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147**

**Attention: Mr. Mickey Bennett
President**

**Subject: Renegotiation Proceedings—
BANNERCRAFT CLOTHING
COMPANY, INC.**

Fiscal Year Ended December 31, 1966

Gentlemen:

Upon review of the unilateral determination which was entered by the Eastern Regional Renegotiation Board in the amount of \$75,000 (\$68,556 after adjustment on account of state income taxes) for your fiscal year ended December 31, 1966, The Renegotiation Board has likewise determined that you received or accrued excessive profits in the amount of \$75,000 (\$64,921 after adjustment on account of state income taxes, as recomputed).

It is required that this determination be embodied in a bilateral agreement or in an order of the Board.

Will you please let the undersigned know not later than May 12, 1970, whether you wish to enter into a bilateral agreement, or whether the Board should proceed to issue a bilateral order, providing for the payment to the Government of the sum of \$64,921. This amount is subject to reduction, of course, by any applicable credit for Federal income taxes as provided in the Internal Revenue Code.

Very truly yours,

**Signed: Nathan Bass
NATHAN BASS**

Secretary to the Board

cc: Robert L. Ackerly, Esq.

Sellers, Conner & Cuneo

Tait, Weller & Baker

Certified Public Accountants

Attention: Mr. William B. Downes

EXHIBIT G

**THE RENEGOTIATION BOARD
Washington, D.C. 20446**

**REGISTERED-RETURN
RECEIPT REQUESTED**

Apr. 29, 1970

**Bannercraft Clothing Company, Inc.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147**

**Attention: Mr. Mickey Bennett
President**

**Subject: Renegotiation Proceedings—
BANNERCRAFT CLOTHING
COMPANY, INC.**

Fiscal Year Ended December 31, 1967

Gentlemen:

Upon consideration of the above proceedings, The Renegotiation Board has determined that you realized excessive profits in the amount of \$1,450,000 (\$1,431,097 after adjustment on account of state income taxes) for the fiscal year indicated. (The Eastern Regional Renegotiation Board previously determined that you realized excessive profits of \$1,400,000—\$1,377,827 after adjustment on account of state income taxes—for this fiscal year.)

It is required that the Board's determination be embodied in a bilateral agreement or in an order of the Board.

Will you please let the undersigned know not later than May 12, 1970, whether you wish to enter into a bilateral agreement, or whether the Board should proceed to issue a unilateral order, providing for the payment to the Government of the sum of \$1,431,097. This amount is subject to reduction, of course, by any applicable credit for Federal income taxes as provided in the Internal Revenue Code.

Very truly yours,

**Signed: Nathan Bass
NATHAN BASS
Secretary to the Board**

**cc: Robert L. Ackerly, Esq.
Sellers, Conner & Cuneo
Tait, Weller & Baker
Certified Public Accountants
Attention: Mr. William B. Downes**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147,

PLAINTIFF,

Civil Action No.—

v.

THE U.S. RENEGOTIATION BOARD,

DEFENDANT.]

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiff, Bannercraft Clothing Company, Inc., applies, pursuant to Rule 65-b, Federal Rules of Civil Procedure, for a Temporary Restraining Order, restraining and enjoining Defendant and its agents, servants and employees, including those of Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, or in any way acting upon the Renegotiation of Plaintiff for Plaintiff's Fiscal Years 1966 and 1967 on the grounds that immediate and irreparable injury, loss, and damage would result to the Plaintiff before a hearing can be had herein, as more fully appears in the Complaint and Affidavit attached hereto.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY
Attorney for Plaintiff
Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006
ST 3-0600

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING Co., Inc.
Philadelphia, Pennsylvania,

PLAINTIFF,

v.

THE RENEGOTIATION BOARD

DEFENDANT.

Civil Action No. —

AFFIDAVIT OF JAMES J. GALLAGHER

I, JAMES J. GALLAGHER, having been first duly sworn, now depose and say that:

1. I am Special Counsel to Bannercraft Clothing Co., Inc. (hereinafter "Plaintiff"), providing legal services to Plaintiff in connection with requirements of Plaintiff under the Renegotiation Act of 1951. I am thoroughly familiar with the company's records relating to renegotiation and with the actions and activities of Plaintiff and the Renegotiation Board in connection with renegotiation of Plaintiff's Fiscal Years 1966 and 1967.

2. In accordance with the Renegotiation Act of 1951, Plaintiff timely filed its Standard Form of Contractor's Report for Renegotiation (otherwise designated "RB Form 1") for its Fiscal Years 1966 and 1967.

3. On December 29, 1969 and March 16, 1970, Defendant sent Plaintiff its Summary of Facts and Reasons for Plaintiff's Fiscal Years 1966 and 1967, respectively. These documents purport to set forth the underlying reasons for Defendant's determination of excessive profits. Statements made in both of these documents, in some instances expressly, in some implicitly, refer to other documents which are in the possession of Defendant for their support, which documents were and are unknown to Plaintiff. In addition, certain material portions of these documents were in error, or were otherwise erroneous, inaccurate, and unsupported.

4. Final determinations that Plaintiff realized excessive profits of \$75,000 in Fiscal Year 1966 and \$1,400,000 in Fiscal Year 1967 were made by the Eastern Regional Renegotiation Board on November 25, 1969 and February 20, 1970, respectively.

By letters dated April 29, 1970, the Renegotiation Board made final determinations that Plaintiff realized excessive profits of \$75,000 in Fiscal Year 1966 and \$1,450,000 in Fiscal Year 1967. Plaintiff does not know what accounts for the \$50,000 difference between the determination for Fiscal Year 1967 made by the Eastern Regional Renegotiation Board and that made by the Renegotiation Board.

Plaintiff has been given until May 12, 1970 to agree to the Defendant's determination. If Plaintiff does not agree, Defendant will issue a unilateral order providing for the payment to the Government of the entire amount determined to be excessive profits.

5. On March 16, 1970, Plaintiff sent a letter to the Secretary of the Renegotiation Board requesting the production for inspection and copying, in accordance with 5 U.S.C. 552 (the Public Information Act Amendment), of certain documents. No response to this request has been received by Plaintiff.

6. On April 10, 1970, Plaintiff met with representatives of Defendant. At the beginning of that meeting Plaintiff requested that the meeting be stayed until Defendant determined what course it would follow pursuant to the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, No. 22,635, decided March 10, 1970. Defendant denied Plaintiff's request and continued with the meeting.

7. It reasonably appears that Defendant relied materially upon documents in its possession, including the remaining portions of its "Report," which were not made available to Plaintiff, in reaching its determination of excessive profits. Plaintiff has been unable to respond to the information therein contained, which information appears to be erroneous, inaccurate, or misleading, and Plaintiff has therefore been and continues to be unable reasonably to avail itself of the administrative proceeding established by Defendant.

8. In the absence of an adequate administrative remedy and upon a determination of excessive profits by Defendant, Plaintiff will have no reasonable recourse other than to pay any amounts determined or to make very substantial partial payments against such amounts and incur substantial interest costs on the remainder, pending any review (as pro-

vided by the Renegotiation Act of 1951) by the Tax Court of the United States. Such events would cause Plaintiff irreparable damage.

/s/ James J. Gallagher
JAMES J. GALLAGHER

DISTRICT OF COLUMBIA ss

Sworn and subscribed to before me this 1st day of May, 1970.

/s/ Irene L. Jarvis
Notary Public

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.
1234 Carpenter Street
Philadelphia, Pennsylvania 19147,

PLAINTIFF,

Civil Action No.—

v.

THE U.S. RENEGOTIATION BOARD,

DEFENDANT.

MOTION FOR PRELIMINARY INJUNCTION

TO: DEFENDANT, THE RENEGOTIATION BOARD,
AND ITS ATTORNEYS.

Plaintiff moves the court for a Preliminary Injunction enjoining Defendant, their agents, servants and employees, including those of Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, or in any way acting upon the renegotiation of Plaintiff for Plaintiff's Fiscal Years 1966 and 1967, pending the final decision of this court on Plaintiff's Complaint, on the grounds that:

1. Continuation of renegotiation proceedings without the availability to Plaintiff of the documents specified in Paragraph 8 of its Complaint would cause Plaintiff to be unable adequately, reasonably, or fairly to present its position in such renegotiation proceedings, and would result in determinations by Defendant which were unfair, inequitable, invalid, and confiscatory. Such determinations without an opportunity for Plaintiff to inspect such documents would deny Plaintiff due process of law in the pending renegotiation proceedings.

2. The production for Plaintiff's inspection of the documents specified in Paragraph 8 of Plaintiff's Complaint is absolutely essential to the conduct of renegotiation for Plaintiff's Fiscal Years 1966 and 1967, or Plaintiff will be effectively denied any reasonable administrative remedy and procedure as contemplated by The Renegotiation Act of 1951, 50 App. U.S. Code 1210, *et seq.*

3. The granting of a Preliminary Injunction herein will

not cause undue delay or loss to Defendant, but will prevent irreparable injury to Plaintiff.

This motion will be based on this notice of motion, on the affidavit of James J. Gallagher, and all of the other pleadings and papers on file in this action.

/s/ Robert L. Ackerly
 ROBERT L. ACKERLY
 Attorney for Plaintiff

Sellers, Conner & Cuneo
 1625 K Street, N.W.
 Washington, D.C. 20006
 ST 3-0600

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BANNERCRAFT CLOTHING COMPANY, INC.,
PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

**Civil Action
No. 1340-70**

DEFENDANT'S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFF'S APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendant, by its undersigned attorneys, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, respectfully moves this Court to dismiss the above-entitled action on the ground that the Court lacks jurisdiction over the subject matter of this action and the complaint fails to state a claim upon which relief can be granted. Defendant further opposes plaintiff's application for a temporary restraining order and preliminary injunction and respectfully requests the Court to deny plaintiff's motions.

In support of this motion the Court is respectfully referred to the points and authorities in support of defendant's motion to dismiss and in opposition to plaintiff's application for a temporary restraining order and preliminary injunction filed herewith and to Exhibit A attached hereto:

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General

THOMAS A. FLANNERY
United States Attorney

JOSEPH M. HANNON
Assistant United States Attorney

HARLAND F. LEATHERS
DAVID EPSTEIN
Attorneys, Department of Justice
Attorneys for Defendant

UNITED STATES DISTRICT COURT
CENTRAL DIVISION OF CALIFORNIA

HOLLY CORPORATION,
Azura California,

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,
DEFENDANT.

No. 69-198-JWC

MEMORANDUM DECISION AND
ORDER DENYING TEMPORARY
INJUNCTION

Without deciding the question of jurisdiction, the temporary injunction which plaintiff seeks herein is hereby denied, for the following reasons:

1. There is little likelihood that plaintiff will succeed in the pending action as its demands are general in nature and appear to call for information in categories not made available to the public. 32 C.F.R. § 1480.9.

2. At least short of a hearing before the tax court, no irreparable injury will occur to the plaintiff if the renegotiation hearing is permitted.

DATED: February 11, 1969.

JESSE W. CURTIS
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC. }

PLAINTIFF, }

v. }

THE RENEGOTIATION BOARD, }

DEFENDANT. }

Civil Action
No. 1340-70

ORDER

Upon consideration of the complaint herein, the Application for a Temporary Restraining Order and Affidavit in support thereof, the Memorandum of Points and Authorities filed in support of the Application, and after oral argument of counsel for both parties, it appears to the Court as follows:

1. Plaintiff, during the years 1966 and 1967, performed Government contracts which are subject to The Renegotiation Act of 1951, as amended, 50 App. U.S.C. §§ 1211-1233 (1964 ed.)

2. Defendant has determined, by letters dated April 29, 1970, copies of which are attached to the complaint as Exhibits F and G, that Plaintiff realized excessive profits of \$75,000.00 in Fiscal Year 1966 and \$1,450,000.00 in Fiscal Year 1967. Those determinations will become final on May 12, 1970.

3. Plaintiff has requested by letter dated March 16, 1970, a copy of which is attached to the complaint as Exhibit E, that the Defendant produce certain designated records which Plaintiff believes will aid in the preparation of and presentation of its position before The Renegotiation Board for these fiscal years.

4. Defendant has repeatedly denied requests for production of documents made by this Plaintiff and by others. (See *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, No. 22,635 (D.C. Cir., decided March 10, 1970)).

5. Unless the Defendant, The Renegotiation Board, is restrained and enjoined from continuing the renegotiation proceedings with respect to Plaintiff's Fiscal Years 1966 and 1967, the Board will proceed to a final determination prior to a determination of the Plaintiff's right to the pro-

duction of certain documents heretofore requested of The Renegotiation Board by the Plaintiff.

6. In light of the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp. v. The Renegotiation Board, supra*, it is likely that Plaintiff will be successful in this litigation and that Defendant will be required to produce these documents. Plaintiff will suffer irreparable injury if the documents are not produced prior to completion of the renegotiation proceedings.

WHEREFORE, it is by the Court this 6th day of May, 1970,
ORDERED:

That the Defendant, The Renegotiation Board, its agents, servants, employees and attorneys are hereby temporarily restrained from continuing with the renegotiation proceedings involving the Plaintiff, Bannercraft Clothing Company, Inc., for the Fiscal Years 1966 and 1967 until further order of this Court.

That Plaintiff's Motion for a Preliminary Injunction herein is set for hearing in this Court on May 15, 1970, at 9:30 A.M. o'clock.

That the above Restraining Order shall expire on _____ 1970, unless further extended by order of this Court, provided that Plaintiff first file a bond in the amount of \$100.00 cash, or in the face amount of \$100.00, with surety approved by the Court.

/s/ Jno. Lewis Smith, Jr.
Judge

A TRUE COPY
ROBERT M. STEARNS, Clerk
By Helen K. Bendure
Deputy Clerk

Cash dep. by pltf.
Undertaking _____ for \$100
approved and filed 5-6-1970
ROBERT M. STEARNS, Clerk
By Helen K. Bendure, Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No. 1340-70

DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND RENEWAL OF MOTION TO DISMISS

Defendant, by its undersigned attorneys, hereby opposes plaintiff's motion for a Preliminary Injunction and respectfully requests the Court to deny plaintiff's motion. Defendant pursuant to Rule 12(b) of the Federal Rules of Civil Procedure further renews its Motion to Dismiss the above-entitled action on the grounds that the Court lacks jurisdiction over the subject matter of this action and the complaint fails to state a claim upon which relief can be granted.

In support of this motion defendant herein incorporates by reference its Motion to Dismiss and Opposition to plaintiff's Application for a Temporary Restraining Order and Preliminary Injunction filed on May 5, 1970, as well as the Points and Authorities filed in connection therewith. In addition, the Court is respectfully referred to the Points and Authorities in support of defendant's Opposition to Plaintiff's Motion for Preliminary Injunction and Renewal of Motion to Dismiss and to Exhibit A-1 and Exhibit A attached hereto.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEPENDANT.

Civil Action
No. 1340-70
Affidavit

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

AFFIDAVIT

I, LAWRENCE E. HARTWIG, being first duly sworn under oath, depose and say:

1. I am the Chairman of the Renegotiation Board and as such am familiar with the procedures and operations of such Board and with the files relating to the renegotiation proceedings conducted with plaintiff for the fiscal years ended December 31, 1966 and December 31, 1967. I have read the Complaint for Injunction filed in this action and the Affidavit of James J. Gallagher.

2. Renegotiation proceedings with the plaintiff were commenced on July 5, 1967, with respect to the 1966 fiscal year and on November 15, 1968, with respect to the 1967 fiscal year. Pursuant to Section 105(c) of the Renegotiation Act of 1951, as amended (50 App. U.S.C. 1215(c)), the time within which renegotiation proceedings must be concluded with respect to plaintiff's 1967 fiscal year, will expire on November 15, 1970.

3. The Affidavit of James J. Gallagher refers to a Summary of Facts and Reasons for each of the plaintiff's fiscal years 1966 and 1967, respectively. Such summaries were prepared and issued by the Eastern Regional Renegotiation Board in connection with its determinations that plaintiff realized excessive profits of \$75,000 and \$1,400,000 in such fiscal years, respectively.

4. The Affidavit states that the Renegotiation Board thereafter made final determinations that plaintiff realized excessive profits of \$75,000 in fiscal year 1966, and \$1,450,000 in fiscal year 1967, and that plaintiff does not know what ac-

counts for the \$50,000 difference between the determination for fiscal year 1967 and that made by the Eastern Regional Renegotiation Board.

5. With respect to the letters dated April 29, 1970, referred to in Paragraph 10 of plaintiff's Complaint for Injunction, notifying the plaintiff of the determination by the Renegotiation Board, the Board's regulations provide that, in order to assist the Contractor in determining whether or not it will enter into an agreement, the Board, upon request, will furnish a summary of the facts and reasons upon which the determination is based (32 C.F.R. 1477.3).

6. Plaintiff, through its attorney, by letter dated May 7, 1970, has requested such a summary of the facts and reasons upon which the final determination of the Board is based. A copy of such letter is attached as Exhibit "A." Such request includes a qualification which is not acceptable under the Board's regulations, and will require revision. In any event, the Board considers that it is restrained from complying with the request of the plaintiff by the Order of the United States District Court for the District of Columbia dated May 6, 1970, restraining the Renegotiation Board, its agents, servants, employees and attorneys from continuing the renegotiation proceedings involving the plaintiff for the fiscal years 1966 and 1967, until further order of the court.

/s/ Lawrence E. Hartwig
LAWRENCE E. HARTWIG

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this 13th day of May, 1970.

/s/ Helen V. Allen
Notary Public

My commission expires May 14, 1974.

(SEAL)

EXHIBIT A

SELLERS, CONNER & CUNEO

Formerly

CUMMINGS & SELLERS

Attorneys and Counselors

Commonwealth Building

1625 K Street, Northwest

Washington, D.C. 20006

May 7, 1970

Mr. Nathan Bass, Secretary

The Renegotiation Board

1910 K Street, N.W.

Washington, D.C.

Re: Renegotiation Proceedings—

BANNERCRAFT CLOTHING COMPANY, INC.

Fiscal Years ended 1966 and 1967

Dear Mr. Bass:

This is to acknowledge receipt of your letter of April 29 concerning the above fiscal years of Bannercraft Clothing Company, Inc.

Pursuant to Section 1477.2 of the Regulations of the Board, I request that you send me a written summary of the facts and reasons upon which the final determination of the Board is based for each of these fiscal years. To comply with the formal requirements of this Section and without prejudice to the contractor's right to proffer further evidence after reviewing the Statement of Facts and Reasons, this is to advise you on behalf of Bannercraft Clothing Company, Inc. that we believe we have submitted all the evidence which we presently believe to be relevant to the renegotiation proceedings.

Very truly yours,

/s/ Robert L. Ackerly

ROBERT L. ACKERLY

RLA:js

EXHIBIT "A"

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No. 1340-70

MOTION TO DISSOLVE PRELIMINARY INJUNCTION

Defendant, by its undersigned attorneys, hereby moves that the Order granting plaintiff's Motion for Preliminary Injunction entered on May 15, 1970, in the above-referenced action be dissolved. By this Order the Court enjoined further proceedings before the Renegotiation Board pending further Order of the Court. Defendant maintains that the reasons for continuing the injunction no longer exist and therefore the injunction should be dissolved.

In support of this Motion the Court is respectfully referred to the Points and Authorities in Support of Motion to Dissolve Preliminary Injunction. In addition, the Court is respectfully referred to the affidavit of Randolph Peoples accompanied by the Board's letter dated June 21, 1970, addressed to Robert L. Ackerly, Esquire, counsel for the plaintiff, attached thereto, both of which are identified as Defendant's Exhibit A.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS
Assistant Attorney General
THOMAS A. FLANNERY
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC. }
PLAINTIFF,

v.

THE RENEGOTIATION BOARD, }
DEFENDANT.

Civil Action
No. 1340-70

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss

AFFIDAVIT

I, RANDOLPH PEOPLES, being duly sworn, depose and say:

1. I am employee as a clerk in the mailroom of The Renegotiation Board at its headquarters office, located at 1910 K Street, N.W., Washington, D.C.

2. Attached hereto is a copy of a letter dated July 21, 1970, by Howard W. Fensterstock, General Counsel of The Renegotiation Board, to Robert L. Ackerly, Esq., Messrs. Sellers, Conner & Cuneo, 1625 K Street, N.W., Washington, D.C. 20006. On July 21, 1970, I delivered the original of such letter to the addressee therein named by leaving the same, together with the enclosures therein described, with a receptionist in his office at the address last stated.

RANDOLPH PEOPLES

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this — day of July 1970.

Notary Public

My commission expires

(SEAL)

THE RENEGOTIATION BOARD
Washington, D.C. 20446

Jul. 21, 1970

Robert L. Ackerly, Esq.
Messrs. Sellers, Conner & Cuneo
1625 K Street, N.W.
Washington, D.C. 20006

Re: Renegotiation Proceedings
Bannercraft Clothing Company, Inc.
Fiscal Years 1966 and 1967

Dear Mr. Ackerly:

This is in response to your letters dated March 16, and May 27, 1970, requesting access on behalf of Bannercraft Clothing Company, Inc. to records of the Board, pursuant to the Freedom of Information Act ("FIA"), 5 U.S.C. 552. Your letters were referred to me in accordance with RBR 1480.7(b). I am making available certain of the records requested and denying others, as detailed below.

Both of your letters relate to renegotiation proceedings with Bannercraft for its 1966 and 1967 fiscal years. Read together and in their entirety, they constitute a demand for the production of a large part of the files of the Board in such proceedings, as well as for certain records relating to certain named competitors of Bannercraft.

A. The request of March 16, 1970

Item 1

Interdepartmental and interagency communications between The Renegotiation Board and other Government agencies with respect to Bannercraft's bidding, award and performance of its renegotiable contracts for the fiscal years 1966 and 1967.

In my opinion, these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9 (a)(3), (4), (5) and (7) and (b)(2).

Item 2

Investigatory or other factual reports prepared by employees of the Board containing facts which are

relevant to the Board's determination as to Banner-craft's renegotiable contracts for the years 1966 and 1967.

In my opinion, these records are likewise exempt under 5 U.S.C. 552(b)(3), (4) (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 3

The final opinions, determinations, unilateral orders, agreements, clearance notices, letters not to proceed, and the summaries of facts and reasons on which unilateral orders, agreements, or determinations are based for the years 1962 through 1968 for the following companies:

Hart-Schaeffer & Marx—Chicago
 Botany 500—Philadelphia
 M. Wile & Sons—Buffalo, New York
 Joseph H. Cohen & Sons—Philadelphia
 Pincus Brothers
 College Hall Fashions
 Gutman & Sons—Philadelphia
 Pembroke Clothing—Egg Harbor, New Jersey
 Hirst Tyler & Company—Philadelphia
 Amerson Clothing Company—Pleasantville,
 New Jersey
 Gramaton Clothing—Fort River, Massachusetts

For the years 1962 through 1968, the Board issued 8 clearance notices and 1 renegotiation agreement to contractors included in the group of 11 companies named in this item of your request. A copy of each of these records is enclosed herewith. As authorized by the judgment of the United States Court of Appeals for the District of Columbia Circuit in the case of *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, — F.2d —, No. 22,635, March 10, 1970, identifying details have been deleted from each document in order to preserve the anonymity of the Board's records, to protect the privacy of the persons involved in the disposition of the individual cases, and to prevent the release of confidential information furnished to the Board by contractors subject to renegotiation under the Renegotiation Act of 1951, as amended, respecting their business and financial operations.

The Board did not issue a final opinion (i.e., a Statement of Facts and Reasons) or a Summary of Facts and Reasons to any of such contractors for any of the specified years.

Item 4

The facts upon which The Renegotiation Board concluded that Bannercraft's pricing policy was unreasonable in 1966.

This is not a request for records.

Item 5

An identification of those coat manufacturers with whom Bannercraft's available cost of production was compared as stated on page 4 of the Summary of Facts and Reasons for 1966, and with respect to each such manufacturer, deleting therefrom where necessary, such identification in the data as may be required, the same data described in paragraph 3 above.

This is not a request for records, except to the extent that it seeks, with respect to several manufacturers with whom Bannercraft's cost of production was compared, records of the same types as those described in Item 3 above. For the years 1962 through 1968, to such manufacturers, the Board issued 12 clearance notices, 2 orders and 4 agreements. A copy of each such document is enclosed herewith. Identifying details have been deleted therefrom for the reasons stated above in answer to your Item 3.

The Board did not issue a final opinion (Statement of Facts and Reasons) to any of such manufacturers for any of the specified years. The Board did issue one Summary of Facts and Reasons to one contractor in such group. In my opinion, such Summary is exempt under 5 U.S.C. 552(b) (3), (4) (5) and (7) and RBR 1480.9(a) (3), (4), (5) and (7).

Item 6

The "procurement information" described on page 4 of the Summary of Facts and Reasons for 1966 which was reviewed and which the Board contends indicated that there was a lack of effective price competition. It is requested that this data be made available in detail and, to the extent that it may be included in requests

heretofore stated, that it be identified as the data upon which the Board reached the conclusion that there was a lack of effective price competition.

In my opinion, to the extent that the procurement information referred to in this item consists of written records, such records are exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7) and (b)(2). In addition, to the extent that this item isolates a single statement in the Summary of Facts and Reasons issued by the Eastern Regional Renegotiation Board under date of December 29, 1969 for Bannercraft's 1966 fiscal year, and requests identification and production of all records upon which such statement was either wholly or partly based, the request is subject to the objections set forth below in response to your request of May 27, 1970.

B. The request of May 27, 1970

This request relates to the Summaries of Facts and Reasons issued by the Board on May 21, 1970 with respect to the 1966 and 1967 fiscal years of Bannercraft. It asks upon the Board to identify and produce any records relied upon by the Board in formulating selected statements or conclusions contained in such summaries.

In my opinion, the Board is not obligated, under the FIA or otherwise, to comply in precise terms with a letter which breaks down a lengthy opinion of the Board into a series of detached sentences lifted out of context, and demands that the Board establish and furnish such documentary support as it may have for each such sentence in turn. The Board's summary, like the opinion of a court or any other deciding authority, is an integrated document; it reflects the Board's over-all conclusion that the contractor realized excessive profits; it is predicated upon all written and oral information available to the Board, interpreted and evaluated according to its own judgment and expertise; and it cannot reasonably be compartmentalized in the manner sought.

Consequently, in my opinion, your request, Items 1 to 10, inclusive, should not be granted. My reasons, stated more fully, are as follows:

1. Your letter does not provide the reasonably adequate descriptions required to support a request under the FIA for the production of records. This is because all your items

are cast in terms of statements in a Summary of Facts and Reasons, without regard to the peculiar nature and function of such a summary in the renegotiation process. The FIA does not require the Board to comply with requests of this type, as hereinafter explained. See also RBR 1480.6(b).

2. Compliance with your request would impose upon the Board a severe burden that would frustrate the execution of its statutory mission and is not contemplated by the FIA. Compliance would involve not merely the location and production of identified or identifiable documents. It would require, rather, a careful and informed review of the analysis of the contractor's renegotiation cases for 1966 and 1967, in their entirety, by skilled professional personnel (lawyers, accountants, financial analysts and Board Members) who are critically necessary in carrying on the Board's duties; the complete retracing of the mental processes of evaluation, interpretation, inference and comparison which enter into the preparation of a summary; the selection of those documents which directly or indirectly contributed in whole or in part to the formulation of the several statements or opinions quoted in your request, a selection which might be possible only after dissecting away the nondocumentary sources involved, such as oral exchanges with contractor personnel, and the expertise of our staff, including familiarity with industrial reference works, the trade press, specialized economic studies, etc.; a determination of the exempt or nonexempt character of each such document; and the deletion of any identifying details or exempt matter contained in any such document, and possibly the rewriting of the document to restore coherence. The many hours of time that would necessarily be spent by professional personnel in responding to requests of this type would disrupt and unduly delay the processing of the Board's heavy calendar of renegotiation cases. Such activity would seriously impair the efficiency of the Board's operations, and would represent an unwarranted diversion of substantial amounts of Government funds. The Congress neither intended nor desired such results from the passage of the FIA. The FIA must be so construed, as a practical matter, as not to supersede other Federal laws imposing on Federal agencies tasks which they have the duty to perform, and the work assigned to the Renegotiation Board by the Congress cannot properly be stopped, or largely stopped,

to comply with a request of the character of yours. Even if full reimbursement for the cost of compliance could be calculated in advance, the Board would still be faced with the need to recruit and train the necessary additional professional personnel, and probably to obtain legislative and budgetary authorization therefor, if your request were to be met without disregarding the proper discharge of the Board's statutory mission.

3. The Renegotiation Act provides that the Board "shall endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits * * *" (§ 105(a)). The Supreme Court of the United States has described the renegotiation process as follows (*Lichter v. United States*, 334 U.S. 742, 791 (1948)):

* * * Consistent with the primary need for speed and definiteness in these matters, the original administrative determinations by the respective Secretaries or by the Board were intended primarily as renegotiations in the course of which the interested parties were to have an opportunity to reach an agreement with the Government or in connection with which the Government, in the absence of such an agreement, might announce its unilateral determination of the amount of excessive profit claimed by the United States. This initial proceeding was not required to be a formal proceeding producing a record for review by some other authority. In lieu of such a procedure for review, the Second Renegotiation Act provided an adequate opportunity for a redetermination of the excessive profits, if any, *de novo* by the Tax Court.

4. The Tax Court proceeding affords all the constitutional safeguards of due process, including the procedural right to subpoena records. A request such as yours, under the FIA, tends to convert the informal, nonadversary proceeding before the Board, wisely designed as such, into a formal, adversary, trial-type proceeding like that prevailing in the Tax Court. The Renegotiation Act does not contemplate that the Board's effort to reach a quick agreement with the contractor, undertaken with a "primary need for speed and definiteness," should be encumbered by the employment of discovery or other litigation techniques. It was to further and facilitate this effort that the Board's func-

tions were exempted from the operation of the Administrative Procedure Act except as to the requirements of section 3 thereof (see Section 111 of the Renegotiation Act).

5. The FIA, on its part, was enacted to benefit members of the public generally, not to confer special benefits on those who are litigants or are engaged in business negotiations or renegotiations with the Government, especially if the effect would be to prejudice the public generally in its capacity as taxpayers. The FIA was intended primarily to operate without reference to the pendency of matters between the requestor and the agency, not as a device designed to affect or alter the course of pending matters or to enlarge the procedural rights of persons engaged in them. Specifically, the FIA does not contemplate that its provisions will be used as a discovery tool in the administrative negotiation stages of a renegotiation proceeding, in advance of the time when, by taking his case to the Tax Court, the contractor can enjoy all the procedural and discovery rights of a litigant. Such manipulation of the FIA would seriously undermine the renegotiation process as established by the Congress and recognized by the Supreme Court.

6. Statements made by the Board in a Summary of Facts and Reasons are based on information derived from a variety of sources, both written and unwritten. The written records often include documents wholly or partly exempt from disclosure, consisting of documents received from the contractor, from the procurement departments, or from other sources, public or private. In the preparation of a Summary, these are supplemented by oral communications, and by the inferences, judgment and expertise of Board personnel. The production of only the nonexempt, written records upon which a particular Summary statement or conclusion may directly or indirectly rest would be likely to disclose the basis of the statement only in part, and perhaps in small part. Such partial disclosures might properly be challenged by you as nonresponsive because, by themselves, they would be as likely to obscure as to explain the import of Summary statements to which your request relates them. A request for all the records underlying a particular statement in such a Summary is, thus, not fairly authorized by the FIA, either in its terms or its spirit, and

is also contrary to the prescribed course of renegotiation activities as established by law.

I decline, therefore, to make available to you the records requested in your letter of May 27, 1970.

I call your attention to the provisions of RBR 1480.7(e), providing for Board review of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,
/s/ Howard W. Fensterstock
HOWARD W. FENSTERSTOCK
General Counsel

Enclosures

As stated

cc: Central Files (4) w/original of incoming
correspondence

Messrs. Hartwig, Harrison, Mattingly,
Rinehart, & Whitehead

Mr. Bass

Mr. Kildea FIA File

—copies of enclosures in Mr. Kildea's file

OGC FIA File

OGC Chron

Mr. Chick

Mr. Girard

Robert L. Saloschin, Esq.

Office of Legal Counsel

Department of Justice

HWFensterstock/spc

OGC—July 21, 1970

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No. 1340-70

PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION
TO DISSOLVE PRELIMINARY INJUNCTION

Plaintiff, through its undersigned counsel, hereby opposes Defendant's Motion to Dissolve this Court's Preliminary Injunction, entered on May 15, 1970.

Each of the bases upon which the Motion for Preliminary Injunction was requested, and upon which the Order granting such Motion was entered, exists today. No valid reasons have been advanced to justify modifying the Court's Order of May 15, 1970 in any way.

Defendant's Motion and accompanying Memorandum of Points and Authorities in support thereof are materially in error in both fact and law, and provide no valid basis for action by this Court. Defendant has failed substantially to comply with any of the prerequisites which would warrant the dissolution of the Preliminary Injunction.

In support of Plaintiff's opposition, the Court is respectfully referred to Plaintiff's Memorandum of Points and Authorities which is attached hereto.

Respectfully submitted,

/s/ Robert L. Ackerly

ROBERT L. ACKERLY

/s/ James J. Gallagher

JAMES J. GALLAGHER

SELLERS, CONNER & CUNEO
1625 K Street, N. W.
Washington, D. C. 20006
783-0600
Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BANNERCRAFT CLOTHING COMPANY, INC.

PLAINTIFF,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No. 1340-70

ORDER

Upon consideration of Defendant's Motion to Dissolve Preliminary Injunction and Plaintiff's Opposition thereto and after hearing on said motion,

It is by the Court this 13th day of August, 1970,
ORDERED, that Defendant's Motion to Dissolve the Preliminary Injunction entered herein on May 15, 1970 is denied.

/s/ J. Curran
Judge

THE
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MUSEUM OF NATURAL HISTORY
AND
ZOOLOGY
OF THE
CITY OF LONDON
1850

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AND
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OF THE
CITY OF LONDON
1850

DAVID B. LILLY COMPANY

19

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7-1

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DAVID B. LILLY COMPANY

RELEVANT DOCKET ENTRIES

Complaint; Application for Temporary Restraining Order; and Motion for Preliminary Injunction filed
Application for Temporary Restraining Order withdrawn with prejudice
Application for Temporary Restraining Order and Motion for Preliminary Injunction filed
Order granting Temporary Restraining Order
Motion to Dismiss and/or for Summary Judgment filed
Findings, Conclusions and Order entered

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
Industrial Park Place
P. O. Box 2285
Wilmington, Delaware 19899
a Delaware Corporation,

for itself and as successor in interest to

DELAWARE FASTENER CORPORATION
Industrial Park Place
P. O. Box 2285
Wilmington, Delaware 19899
a Delaware Corporation,

PLAINTIFFS,

VS.

THE RENEGOTIATION BOARD
1910 K Street, N. W.
Washington, D.C. 20006

DEFENDANT.

Civil Action
No. 2055-70

COMPLAINT FOR INJUNCTION AND ORDER OF PRODUCTION

(Pursuant to 5 U.S.C. § 552(a)(3); 81 Stat. 54)

Plaintiffs, DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION, by and through their undersigned counsel, for their Complaint against THE RENEGOTIATION BOARD, allege as follows:

1. This is a civil action over which this Court has subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 in that the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, and arises under the Constitution and laws of the United States; and pursuant to 5 U.S.C. § 552(a)(3) in that identifiable records of THE RENEGOTIATION BOARD, for which Plaintiffs have made demand, are being improperly withheld from Plaintiffs, and such records are situated in the District of Columbia.

2. Plaintiff, DAVID B. LILLY COMPANY, INC., is, and at all times material has been, a corporation organized under the laws of the state of Delaware, with its principal place of business at Industrial Park Place, Wilmington, Delaware.

3. Plaintiff, DELAWARE FASTENER CORPORATION, was, and at all times material until January 23, 1970, had been, a corporation organized under the laws of the state of Delaware, with its principal place of business at Industrial Park Place, Wilmington, Delaware; on January 23, 1970, it was merged into DAVID B. LILLY COMPANY, INC. which succeeded to all rights and interests of DELAWARE FASTENER CORPORATION.

4. Defendant, THE RENEGOTIATION BOARD, established under 50 App. U.S.C. § 1217, is an agency of the United States within the meaning of 5 U.S.C. § 552(a), with its principal or "statutory" office in the District of Columbia.

5. During 1967, both DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION had income from sales and services, which subjected them to the Renegotiation Act of 1951, 50 App. U.S.C. §§ 1211 *et seq.*, as amended. Renegotiation proceedings for 1967 have been begun by the Renegotiation Board with respect to both corporations.

6. The Renegotiation Board, headquartered in Washington, D.C., has conducted the Renegotiation proceedings through its Eastern Regional Renegotiation Board, a delegate of the national Renegotiation Board also headquartered in Washington, D.C., which proceedings are denominated "David B. Lilly Company, Inc. No. 73216-67-A" and "Delaware Fastener Corporation No. 65322-67-A" respectively.

7. During the said renegotiation proceedings, the two corporations have supplied information from their own records to a representative of the Eastern Regional Renegotiation Board, namely Stanley Fishner, Renegotiator.

8. At a meeting on June 4, 1970, with Mr. Fishner, representatives of the two corporations were advised by Mr. Fishner that he was recommending that the two corporations pay a total of \$700,000 to the government, less tax credits. Mr. Fishner further advised that the corporations had a right to a hearing before a "panel" made up of mem-

bers of the Eastern Regional Renegotiation Board, provided that such an appeal-type hearing was requested by a certain date; otherwise the corporations would lose such right and be forced to go either to the national Renegotiation Board for hearing or agree to Mr. Fishner's recommendation.

9. At the said meeting, Mr. Fishner was advised that the corporation's legal representative would, because of an approaching trial, be unable to give the matter the necessary consideration until the end of June or beginning of July, 1970; thereupon Mr. Fishner said that the corporations would have until the end of the week of July 6, 1970, to decide whether to request an appeal hearing before the Eastern Regional Renegotiation Board, or to appeal directly to the national Renegotiation Board or to agree to his recommendation without further appeal.

10. At the said meeting on June 4, 1970, Mr. Fishner also indicated that the Eastern Regional Renegotiation Board had already approved his recommendation.

11. On June 29, 1970, the corporations' legal representative called Mr. Fishner and advised that he was unable to reach a decision as to how to proceed, that he needed additional information for such a determination and was requesting data toward this end. Attached as Exhibit "A" hereto is a copy of the June 29, 1970, letter hand-delivered on that date to the Renegotiation Board (with copy to Mr. Fishner) demanding the production of certain documents, which demand letter is incorporated herein. In said letter, Plaintiffs sought production of the following records:

(1) All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

(2) All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Re-

negotiation Board in the referenced renegotiation proceedings.

(3) All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

(4) All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

(5) All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

12. Despite the said telephone conference and letter of June 29, 1970, the corporations received no response (contrary to the Board's own Regulations—32 C.F.R. § 1480.7), nor have any of the data and records been supplied as requested.

13. The Defendant's refusal even to acknowledge the said request for documents, and its failure to produce same, are a violation of 5 U.S.C. § 552(a)(3), thereby permitting this Court to order the production of such documents.

14. Unless the Defendant is restrained from further proceeding, acting or otherwise making a determination until such data is produced, irreparable harm will be sustained as follows:

(a) since the Eastern Regional Renegotiation Board had already approved Mr. Fishner's recommendation before such recommendation was made known to the Plaintiffs, Plaintiffs will be appealing to an agency already advised of the matter and having information and a predisposition towards the matter;

(b) unless Plaintiffs are apprised of the facts on which the Eastern Regional Board has "approved"

Mr. Fishner's recommendation, they cannot effectively present their case since they cannot know what matters can be rebutted, what information can be developed or what avenues should be pursued;

(c) without the information requested Plaintiffs are unable to intelligently decide whether to accept Mr. Fishner's recommendation and agree to enter into an "agreement of renegotiation." If Plaintiffs are, because of a lack of information, compelled to reject the "tentative recommendation," they subject themselves to the risk—the extent of which they cannot appraise because of this same lack of information—of having the Eastern Regional Board or the National Board increase the amount of alleged "excessive profits."

(d) without the information underlying the Defendant's position, Plaintiffs are in the dark as to even the arguments to be made;

(e) without the requested data, Plaintiffs can do nothing more than have a hearing before the Eastern Regional Renegotiation Board, reiterate what has already been presented (and which has evidently been given little credence by the Defendant) and hope that the Regional Board will further enlighten Plaintiffs as to the basis for its position, a slim likelihood in view of the total failure by the Defendant even to acknowledge the demand for information;

(f) in view of the above, the Defendant's refusal to supply the information requested renders Plaintiffs' appeal rights useless or illusory and may cause Plaintiffs to expend time, effort and money, plus incur the waste of time, all to no avail;

(g) effective appeal rights are of critical importance in resolving a dispute involving substantial sums, and the granting of only a limited appeal right, by withholding information and making the appeal abortive or ineffectual constitutes a real deprivation of Plaintiffs' fundamental procedural and substantive due process rights;

(h) by loss of effective appeal rights, Plaintiffs will be forever deprived of their rights accorded by law and may require Plaintiffs to litigate, uninformed, at higher administrative or judicial levels when such may

well have been avoided by an effective appeal procedure before the Regional Board;

(i) once such an ineffectual appeal hearing is held, Plaintiffs will have forever lost the opportunity to take full advantage of a procedure afforded by law, and by such loss, will suffer irreparable loss and harm;

(j) unless Plaintiffs have access to the data requested, they cannot intelligently and meaningfully determine whether even to proceed before a panel of the Eastern Regional Renegotiation Board, and if they do so proceed, they will be unable to determine, as noted above, what points to rebut, what information to gather and what arguments to make;

(k) Plaintiffs have been advised that unless they elect no later than July 10, 1970 to have a hearing before the Eastern Regional Renegotiation Board, which hearing, Mr. Fishner advised, must be held within the ten days thereafter, they will lose such right; for the Plaintiffs to have to make a totally uninformed judgment as to whether to elect an abortive appeal procedure or alternatively waive it completely creates a dilemma and a loss of an effective legal right, for which loss they have no adequate remedy at law.

WHEREFORE, Plaintiffs ask for an Order compelling Defendant to produce the documents demanded, as described in paragraph 11 above, and further for an Order restraining Defendant from taking any action, from making any determination, from requiring Plaintiffs to elect a procedure and otherwise from affecting Plaintiffs' rights in renegotiation until such documents have been produced and Plaintiffs have been given a reasonable time to study same.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
 1815 H Street, N. W.
 Washington, D. C. 20006
 Telephone: 347-8500
Attorney for Plaintiffs

**LAW OFFICES
ARENT, FOX, KINTNER, PLOTKIN
& KAHN**

**1100 FEDERAL BAR BUILDING
1815 H STREET, N. W.
WASHINGTON, D. C. 20006**

**CABLE: ARFOX
202 347-8500**

**June 29, 1970
HAND DELIVERED**

**Nathan Bass, Secretary
Renegotiation Board
1910 K Street, N. W.
Washington, D. C. 20006**

**Re: David B. Lilly Co., No. 73216-67-A;
*Delaware Fastener Corp., No. 65322-67-A***

Dear Mr. Bass:

Renegotiation proceedings in the referenced matters are now in progress before the Renegotiation Board's Eastern Regional Renegotiation Board. On June 4, 1970, David B. Lilly, John Zebley and I met with Mr. Stanley Fishner, Renegotiator, Mr. Aubrey Bendure, Accountant and with Messrs. Burrell and O'Connor, all of the staff of the Board; at that time, Mr. Fishner advised of his recommendation and inquired whether the contractors wanted a conference with a panel of the Eastern Regional Renegotiation Board, which, Mr. Fishner advised, had already approved his recommendation on May 14, 1970.

I advised Mr. Fishner that I was involved in a trial which was scheduled to begin on June 15, 1970, in Delaware, that the trial was scheduled to last two weeks, that I would have to spend most of the week of June 8, 1970, preparing and thus could not devote sufficient time to an analysis of the matter until the weeks of June 29th and July 6th. We agreed at that time that I would advise Mr. Fishner, sometime during the week of July 6, 1970, as to the steps we decided to take.

EXHIBIT A

Fortunately, my trial in Delaware ended earlier in the week of June 22nd than anticipated, and I have had a further opportunity to go over the matter. I understand also that Mr. Fishner has contacted Mr. Lilly requesting that we decide earlier than the time originally agreed to.

While we are as anxious as you are to proceed with and dispose of the matter as quickly as possible, we find that we are unable to make a fully intelligent and informed judgment as to how to proceed without certain data and information relating to the Board's position. So that we may decide upon our course of action as to any further renegotiation proceedings, would you please furnish us with the following:

1. All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.
2. All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.
3. All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.
4. All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

5. All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referred renegotiation proceedings.

Once we have had the opportunity to study the foregoing, we will be in a better position to determine whether or not to seek a conference with a panel of the Eastern Regional Board; we will also be in a position better to evaluate the matter and to determine what further or alternative steps we may take.

I am having this letter hand-delivered to you today (with copy to Mr. Fishner) to avoid mailing time and in hopes of expediting the matter so that we can advise you of our position during the week of July 6th as agreed upon. With this time limit in mind, I would appreciate your giving attention to our request as quickly as possible.

Sincerely yours,
Burton A. Schwalb

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

PLAINTIFFS,

VS.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No.

AFFIDAVIT OF BURTON A. SCHWALB

I, BURTON A. SCHWALB, do on oath depose and say:

1. I have been counsel to David B. Lilly Company, Inc. and Delaware Fastener Corporation (both before and after the January 23, 1970 merger of Delaware Fastener Corporation into David B. Lilly Company, Inc.) with respect to their renegotiation proceedings for 1967, denominated "David B. Lilly Company, Inc.—No. 73216-67-A" and "Delaware Fastener Corporation—No. 65322-67-A".

2. For some time prior to June 4, 1970, the corporations provided information to the Renegotiation Board through its Renegotiator Stanley Fishner and its auditor Aubrey Bendure. David B. Lilly Company, Inc. had been subject to renegotiation for 1966 and was passed without demand for refund to the government; Delaware Fastener Corporation was passed for 1966 without renegotiation. Affiant's office also participated as counsel with respect to the year 1966. While providing information to the Renegotiation Board for 1967, the corporations were not advised until June 4, 1967 of any decision by the Board nor were the corporations given, by the Board, any information obtained by it from outside sources.

3. On June 4, 1970, I was present at a meeting with Mr. Fishner and others, at which time he advised of his recommendation that David B. Lilly Company, Inc. and Delaware Fastener Corporation be required to pay \$200,000 and \$500,000, respectively, an aggregate of \$700,000, to the gov-

ernment; he also indicated that the Eastern Regional Renegotiation Board, an intermediate appeal level of the National Renegotiation Board, had approved his recommendation during the prior month.

4. We were further advised that we would have to elect whether or not to have an appeal hearing before a panel of the Eastern Regional Renegotiation Board, and, if we so elected, that such a hearing would be held within ten days of such election.

5. Mr. Fishner advised that if we did not seek such an appeal hearing, the corporations could either agree to his recommendation or appeal to the National Renegotiation Board.

6. Since we had not been apprised of Mr. Fishner's recommendation before June 4, 1970, we requested time in order to review the matter in detail and to consider what course of action to take. Because I was then preparing for a trial set to begin on June 15, 1970 (and scheduled for two weeks) and was also involved in other matters, we requested that we be given until the end of the week of July 6, 1970 within which to decide on a course of action so that I could have, in effect, the first two weeks of July, 1970 to explore the matter further.

7. After having an opportunity to go into the matter further during the week of June 22, 1970, I telephoned Mr. Fishner on June 29, 1970 and had a letter hand delivered to the Renegotiation Board on that date. In such communications, I advised that we did not feel we could make an enlightened judgment on how to proceed without having the information outlined in my June 29, 1970 letter, attached as Exhibit "A" to the Complaint filed herein, and incorporated herein.

8. No response to my request has been made by the Renegotiation Board.

9. Mr. Fishner advised that unless a hearing before such a panel of the Eastern Regional Renegotiation Board is elected during the week of July 6, 1970, the right thereto will be lost.

10. Mr. Fishner also advised that the Board was treating Plaintiffs in a manner comparable to other similarly situated contractors and that others had been contacted for information, but he would give no indication of the facts so obtained nor how the facts led to his specific recommenda-

tion as approved by the Eastern Regional Renegotiation Board.

11. Mr. Fishner has also advised that, on appeal, the amount recommended as a payment to the government could be increased.

12. While the corporations know what information they have given to the Board as to their operations, they do not know what information the Board obtained from other sources, nor the significance or qualitative or quantitative value given to such information. Consequently, the corporations have been unable to determine whether the Board has any information which should be corrected or implemented, what arguments to make, what facts to explore and develop and whether, by July 10, 1970, to elect the procedure of seeking an appeal to a panel of the Eastern Regional Renegotiation Board.

BURTON A. SCHWALB

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

PLAINTIFFS,

VS.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No.

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, by and through their undersigned counsel, pursuant to Rule 65(b), Federal Rules of Civil Procedure, respectfully move this Court to issue a Temporary Restraining Order restraining and enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is restrained and enjoined forthwith as more fully appears in the Complaint and Affidavit filed in this action.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Telephone: 347-8500
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,
PLAINTIFFS,

VS.

THE RENEGOTIATION BOARD,
DEFENDANT.

Civil Action
No.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through their undersigned counsel, respectfully move this Court to issue a Preliminary Injunction enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is enjoined forthwith as more fully appears in the Complaint and Affidavit filed in this action.

BURTON A. SCHWALB
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1815 H Street, N. W.
Washington, D. C. 20006
Telephone: 347-8500

Attorney for Plaintiffs

PRAECIPE

**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA**

the 10th day of July 1970

DAVID B. LILLY Co., INC.

vs.

THE RENEGOTIATION BOARD

} **Civil Action**
} **No. 2055-70**

***The Clerk of said Court will please note the withdrawal,
without prejudice to the refiling thereof, of the plaintiff's
Application for a Temporary Restraining Order.***

BURTON A. SCHWALB
1815 H Street, N. W.
Washington, D. C. 20006
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

PLAINTIFFS,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No. 2055-70

APPLICATION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs, by and through their undersigned counsel, pursuant to Rule 65(b), Federal Rules of Civil Procedure, respectfully move this Court to issue a Temporary Restraining Order restraining and enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is restrained and enjoined forthwith as more fully appears in the Complaint and Affidavits filed in this action.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

PLAINTIFFS,

v.

THE RENEGOTIATION BOARD,

DEFENDANT.

MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs, by and through their undersigned counsel, respectfully move this Court to issue a Preliminary Injunction enjoining Defendant, its agents, servants and employees, including the Defendant's Eastern Regional Renegotiation Board, from instituting, continuing, completing, in any way acting upon, or requiring Plaintiffs to take any action in connection with, the renegotiation proceedings relating to DAVID B. LILLY COMPANY, INC. and DELAWARE FASTENER CORPORATION for the fiscal year 1967, on the grounds that immediate and irreparable injury, loss and damage will result to Plaintiffs unless Defendant is enjoined forthwith as more fully appears in the Complaint and Affidavits filed in this action.

BURTON A. SCHWALB
Arent, Fox, Kintner, Plotkin & Kahn
1815 H Street, N. W.
Washington, D. C. 20006
Telephone: 347-8500

Attorney for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

PLAINTIFFS,

VS.

THE RENEGOTIATION BOARD,

DEFENDANT.

Civil Action
No. 2055-70

AFFIDAVIT OF BURTON A. SCHWALB

I, BURTON A. SCHWALB, do on oath depose and say:

1. I have been counsel to David B. Lilly Company, Inc. and Delaware Fastener Corporation (both before and after the January 23, 1970 merger of Delaware Fastener Corporation into David B. Lilly Company, Inc.) with respect to their renegotiation proceedings for 1967, denominated "David B. Lilly Company, Inc.—No. 73216-67-A" and "Delaware Fastener Corporation—No. 65322-67-A."

2. As counsel for David B. Lilly Company, Inc. and Delaware Fastener Corporation, I prepared an Affidavit on July 9, 1970, which Affidavit was filed with this Court in the captioned proceeding. The matters stated in my earlier Affidavit will not be repeated herein; rather, this Affidavit is submitted as an Addendum to the earlier Affidavit.

3. On the morning of July 9, 1970, David B. Lilly Company, Inc. and Delaware Fastener Corporation commenced the captioned action and filed an Application for a Temporary Restraining Order. Copies of the Complaint, the Application for Temporary Restraining Order, and my Affidavit were delivered to the United States Marshall, together with summonses, for service on the United States Attorney, The United States Attorney General and the Renegotiation Board, respectively. A copy of each of these pleadings was hand delivered to Joseph M. Hannon,

Esquire, Chief of the Civil Division of the District of Columbia United States Attorney's office.

4. A hearing on Plaintiffs' Application for a Temporary Restraining Order was set for 4:30 p.m., on July, 1970, before the Honorable William B. Jones. At approximately 3:00 p.m., Mr. Hannon and I were able to effect a stipulation, in which we agreed that the deadline of July 10, 1970 by which the Plaintiffs would otherwise be forced to elect what procedures to take, was cancelled and no new deadline was set. It was further agreed that the Board's Renegotiator, Mr. Stanley Fishner, would call me in the future for the purpose of our setting a new date, by mutual agreement, by which Plaintiffs must make a decision as to the procedures to be taken. If, at that future date, the Plaintiffs elect to have a hearing before a panel of the Eastern Regional Renegotiation Board, then a date for such a hearing would then be set by agreement. It was also understood that the Renegotiation Board would give consideration to Plaintiffs' request for documents and advise Plaintiffs at some future time (left open) as to its position. This agreement was confirmed in a letter dated July 9, 1970, which was hand delivered to Mr. Hannon on July 10, 1970. A copy of my letter is attached hereto as Exhibit "1".

5. Pursuant to this agreement, the hearing scheduled before Judge Jones at 4:30 p.m. on July 10, 1970 was cancelled, and a Praecipe was filed withdrawing Plaintiffs' Application for a Temporary Restraining Order, without prejudice to the refiling thereof.

6. On July 27, 1970, I received a letter, dated July 24, 1970, from Howard W. Fensterstock, General Counsel of the Renegotiation Board. In his letter, Mr. Fensterstock notified Plaintiffs that he refused to make available any of the documents requested by Plaintiffs. Mr. Fensterstock closed his letter by pointing out that pursuant to Renegotiation Board Regulation 1480.7(e), Plaintiffs have a right to obtain a review of his decision. The text of Regulation 1480.7(e) [32 C.F.R. § 1480.7(e)] is quoted on page 2 of Plaintiffs' Memorandum of Points and Authorities filed herewith. A copy of Mr. Fensterstock's letter of July 24, 1970 is attached as Exhibit 2.

7. On July 30, 1970, three days after receipt of Mr. Fensterstock's letter advising Plaintiffs of their right to

seek review of their request for documents within 20 days, I received a telephone call from the Board's Renegotiator, Mr. Stanley Fishner. In that telephone conversation, Mr. Fishner advised me that the Plaintiffs would have to decide by the close of the day of Friday, July 31, 1970 whether or not to accept his recommendation or, if they did not accept it, whether they want a hearing before the Eastern Regional Renegotiation Board on August 12, 1970. Mr. Fishner would not agree to a later date and he advised that if Plaintiffs did not agree with his recommendation and did not waive the hearing before the Eastern Board by the close of July 31, 1970, then the Eastern Board would, on August 12, 1970, review the matter. I requested that the matter not be set on August 12, 1970 before the Eastern Board since I intended to request the National Board to review the preliminary denial of our request for documents. Mr. Fishner advised that the Eastern Board was insisting on a date no later than August 12, 1970 whether or not Plaintiffs' request for documents was still pending final determination by the National Board. Since the Eastern Regional Renegotiation Board has the power to increase the renegotiator's recommendation, Plaintiffs believe that it would be unfair to require that they be placed in such jeopardy and be denied the full and effective administrative review on the merits because of the refusal to afford them the documents and information to which they believe they are entitled and which they believe they need for an effective presentation of their case.

8. At the present time, as on July 9, 1970, when I made my earlier Affidavit, the Plaintiff corporations do not know what information the Board obtained from other sources (e.g., "by comparing Plaintiffs to other similarly situated contractors"), or the significance or qualitative or quantitative value given to such information. Consequently, now as before, the Plaintiff corporations are unable to determine whether the Board has information which should be corrected or supplemented, what arguments to make, what facts to explore and develop and whether to accept or reject Mr. Fishner's tentative recommendation of excessive profits, or to permit the matter to go before a panel of the Eastern Regional Renegotiation Board, which panel, Mr. Fishner earlier advised, could increase the amount recommended as a payment to the Government.

/s/ **Burton A. Schwalb****BURTON A. SCHWALB****Sworn and subscribed before me this 31st day of July, 1970.**/s/ **Julia B. Coffey****Notary Public****My commission expires 4/14/74.**

LAW OFFICES

**ARENT, FOX, KINTNER, PLOTKIN
& KAHN**

**1100 FEDERAL BAR BUILDING
1815 H STREET, N. W.**

WASHINGTON, D. C. 20006

CABLE: ARFOX

202 347-8500

July 9, 1970

**Joseph M. Hannon, Esquire
Chief, Civil Division
Office of the United States Attorney
District of Columbia
United States Courthouse
Constitution Avenue and John Marshall Place, N. W.
Washington, D. C.**

**Re: Lilly Co. v. Renegotiation Board
Civil No. 2055-70 D.C. D.C.**

Dear Mr. Hannon:

This will confirm our discussions today regarding the above case and our Application for a Temporary Restraining Order which was originally scheduled before Judge Jones at 4:30 p.m. today, and which hearing has been cancelled by agreement.

It was agreed that the deadline of tomorrow, July 10, 1970, by which the plaintiffs would otherwise have been forced to elect what procedures to take, has been cancelled and no new deadline has been set. It was further agreed that the Renegotiator (Mr. Fishner, who is presently on vacation), will call us in the future for purposes of our setting a new date, by mutual agreement, by which we must make an election as to the procedures to be taken; if, at that future date, the plaintiffs elect to have a hearing before a panel of the Eastern Regional Renegotiation Board, then a date for such hearing shall at that time be set by agreement.

It was also understood that the Renegotiation Board would give consideration to our request for documents and

advise us, at some future time (left open), as to its position. It was further understood that, if the plaintiffs were not satisfied with the Board's position as to documents, we would then, if we deemed it appropriate, have a hearing on our Motion for Preliminary Injunction or refile our Application for a Temporary Restraining Order, whichever happens to be more appropriate.

This is to make it clear that neither you nor the Board has committed itself in any way to produce the documents requested, but the purpose of the agreement is simply to permit the parties to have more time to resolve the matter of documents before a decision must be made by the plaintiffs as to the procedural steps to take.

Please let me know if any of the above is contrary to your understanding.

Please accept my sincerest gratitude for the very efficient and effective way in which you handled the matter; I am certain that you saved both the parties and the Court considerable time and expense and paved the way for an expeditious resolution of the problem.

Enclosed herewith is a copy of a praecipe withdrawing our Application for a Temporary Restraining Order without prejudice, which procedure was suggested by Mr. Foote, Judge Jones' Law Clerk.

Sincerely yours,
/s/ Burton A. Schwalb
BURTON A. SCHWALB

Enclosure

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,
PLAINTIFFS,

VS.

THE RENEGOTIATION BOARD,
DEFENDANT.

Civil Action
No. 2055-70

ORDER

Upon consideration of the Complaint herein, the Application for a Temporary Restraining Order and Affidavit in support thereof, the Memorandum of Points and Authorities filed in support of the Application, and after oral argument of counsel, it appears to the Court as follows:

1. Plaintiffs, during the fiscal year 1967, performed Government contracts which are subject to The Renegotiation Act of 1951, as amended, 50 App. U.S.C. §§ 1211-1233 (1964 ed.).

2. Defendant's Renegotiator, Mr. Stanley Fishner, has recommended that Plaintiffs refund "excessive profits" totalling \$700,000.00. The recommendation will be referred to a panel of Defendant's Eastern Regional Renegotiation Board for a final recommendation on August 12, 1970, unless Plaintiffs agree to enter into a "renegotiation agreement" in the amount of the "tentative recommendation" or decline a panel meeting on or before close of business on July 31, 1970.

3. Plaintiffs have requested by letter dated June 29, 1970, a copy of which is attached to the Complaint as Exhibit A, that the Defendant produce certain designated records which Plaintiffs believe will materially aid in determining whether to enter into an agreement or whether to request a panel meeting and if so, in preparation of and

presentation of their position before Defendant's Eastern Regional Renegotiation Board.

4. Defendant's General Counsel has denied Plaintiff's request, and Defendant has repeatedly denied requests for production of documents made by others (See *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, No. 22,635 (D.C. Cir., decided March 10, 1970)).

5. Unless the Defendant, The Renegotiation Board, is restrained and enjoined from continuing the renegotiation proceedings with respect to Plaintiffs' fiscal year 1967, Plaintiffs will be irreparably harmed as more fully appears in the Complaint filed herein.

6. In light of the decision of the United States Court of Appeals for the District of Columbia in *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, *supra*, it is likely that Plaintiffs will be successful in this litigation and that Defendant will be required to produce all or part of the documents sought. Plaintiffs will suffer irreparable injury if the documents are not produced sufficiently in advance of the date on which Plaintiffs must decide what course of action to pursue.

WHEREFORE, it is by the Court this 31st day of July, 1970,

ORDERED:

1. That Defendant, The Renegotiation Board, its agents, servants, employees, and attorneys are hereby temporarily restrained from continuing with, or instituting any further proceedings, in connection with the renegotiation proceedings involving the Plaintiffs, David B. Lilly Company, Inc. and Delaware Fasterner Corporation, for the fiscal year 1967; from requiring Plaintiffs to elect whether to enter into a "renegotiation agreement" or to request a panel meeting before Defendant's Eastern Regional Renegotiation Board; from taking any action to prejudice or curtail Plaintiffs' right to request or decline a panel meeting before Defendant's Eastern Regional Renegotiation Board; and from taking any other action which will affect, or in any way prejudice, Plaintiffs' rights, in connection with the renegotiation proceedings aforesaid, until further Order of this Court.

2. That Plaintiffs' Motion for a Preliminary Injunction

herein is set for hearing in this Court on
1970, at o'clock.

3. That the above Restraining Order shall expire on
....., 1970, unless further extended by Order of
this Court, provided that Plaintiffs first file a bond in the
amount of \$..... cash, or in the face amount of \$.....,
with surety approved by the Court.

.....
Judge

Date:

Time:

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

Plaintiff,

Civil Action
No. 2055-70

v.

THE RENEGOTIATION BOARD,

Defendant.

ORDER

Upon consideration of the Complaint herein, Plaintiff's Application for a Temporary Restraining Order, supporting Affidavits, Memoranda of Points and Authorities, arguments of counsel, and further in consideration of this Court's Order dated July 31, 1970 and the factors recited therein, and in consideration of the fact that the said July 31, 1970 Order of this Court will expire on August 10, 1970 at a time when the United States District Judge entering said Order will be unavailable either for a hearing on Plaintiff's Motion for a Preliminary Injunction or for purposes of extending the said Temporary Restraining Order, and it appearing that the Plaintiff will suffer irreparable harm unless the said Temporary Restraining Order is extended, now therefore,

IT IS HEREBY ORDERED that the July 31, 1970 Temporary Restraining Order issued by this Court in the above case by and hereby is extended in its entirety and in full force and effect until August 20, 1970 on which date, at 10 o'clock a.m., a hearing shall be held on Plaintiff's Motion for a Preliminary Injunction, and further that Plaintiff's security in the amount of \$100.00 cash shall be retained by this Court as the sole security for the Plaintiff's undertaking with respect to the July 31, 1970 Temporary Restraining Order and this Order extending the time thereof.

.....
United States District Judge

Date:

Time:

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

Plaintiff,

Civil Action
No. 2055-70

v.

THE RENEGOTIATION BOARD,

Defendant.

MOTION OF DEFENDANT TO DISMISS THE COMPLAINT OR,
IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

The defendant, by its counsel the United States Attorney for the District of Columbia, moves the Court to dismiss the complaint or, in the alternative, for summary judgment on the grounds that the complaint, the exhibits filed herein and by reference made a part hereof, demonstrate there is no issue or controversy, there is no claim upon which relief can be granted, there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law.

/s/

THOMAS A. FLANNERY
United States Attorney

/s/

JOSEPH M. HANNON
Assistant United States Attorney

/s/

ROBERT M. WERDIG, JR.
Assistant United States Attorney

Jul 24, 1970

Burton A. Schwalb, Esq.
Messrs. Arent, Fox, Kintner,
Plotkin & Kahn
1100 Federal Bar Building
1815 M Street, NW
Washington, D. C. 20006

Re: David B. Lilly Co., No. 73216-67-A
Delaware Fastener Corp., No. 56322-67-A

Dear Mr. Schwalb:

This is in response to that portion of your letter dated June 29, 1970, which requests access on behalf of David B. Lilly Co., and Delaware Fastener Corp. to records of the Board, presumably pursuant to 5 U.S.C. 552. Your letter has been referred to me in accordance with RBR 1480.7(b).

For the reasons set forth below, I must decline to comply with your request.

RBR 1480.6(b) provides that a person who requests access to identifiable records must provide a reasonably specific description of the particular records sought, and that the Board will not comply with a request that does not provide an adequate description, or with a general or blanket request. In my opinion, the items numbered 1, 3, 4 and 5 in your letter constitute a general or blanket request for records within the meaning of this regulation.

In addition, I have concluded as follows with respect to the individual items of your request:

Item 1

All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

Item 4

All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

In my opinion, these records are exempt from disclosure under 5 U.S.C. 552(b)(1), (4), (5) and (7) and RBR 1480.9 (a)(3), (4), (5) and (7) and (b)(2).

Item 2

All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.

The records of the Board show that a copy of the accounting section of the Report of Renegotiation in each of the two proceedings in question was furnished to the contractor involved on February 5, 1970, pursuant to RBR 1472.3(d), and that certain revised pages were sent to each on May 26, 1970. In my opinion, the remainder of each such report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 3

All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

Item 5

All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

In my opinion, these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9 (a)(3), (4), (5) and (7).

I call your attention to the provisions for Board review of this decision if a written request therefor is made to the Secretary of the Board within 20 days after the date of this letter.

Very truly yours,

(Signed) Howard W. Fensterstock
HOWARD W. FENSTERSTOCK
General Counsel

**LAW OFFICES
ARENT, FOX, KINTNER, PLOTKIN
& KAHN**

**1100 FEDERAL BAR BUILDING
1815 H STREET, N. W.
WASHINGTON, D. C. 20006**

**CABLE: ARFOX
202 347-8500**

August 6, 1970

**Nathan Bass, Secretary
The Renegotiation Board
1910 K Street, N.W.
Washington, D. C. 20006**

**Re: David B. Lilly Company, Inc. No. 73216-67-A
Delaware Fastener Corporation No. 65322-67-A**

Dear Mr. Bass:

On June 29, 1970, I wrote to The Renegotiation Board requesting access to records of the Board on behalf of David B. Lilly Company, Inc. and Delaware Fastener Corporation in connection with the referenced renegotiation proceedings. Last week I received a letter dated July 24, 1970, from Howard W. Fensterstock, General Counsel to the Board. In his letter, Mr. Fensterstock denied any access to the requested records. I am writing at this time to ask that the Board review Mr. Fensterstock's action, as provided in RBR 1480.7(e) [32C. F. R. § 1480.7(e)]. For the Board's convenience, I am enclosing copies of my letter of June 29, 1970 and Mr. Fensterstock's letter of July 24, 1970.

In connection with the Court proceedings which have been instituted, we have filed Memorandum of Points and Authorities setting forth our position as regards our right to the documents requested under the Freedom of Information Act (5 U.S.C. § 552), and the holding of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Engineering Corporation v. The Renegotiation Board*, 425 F. 2d 578 (D. C. Cir. 1970).

In addition to the *Grumman Aircraft* case, it is our position that our right to the documents requested is supported further by *American Mail Line, Ltd. v. Gulick*, 411 F. 2d 696 (D. C. Cir. 1969), *Bristol Meyer Company v. FTC*, 424 F. 2d 935 (D.C. Cir. 1970), *General Services Administration v. Benson*, 415 F. 2d 878 (9th Cir. 1969) and, *Consumers Union of the United States, Inc. v. The Veterans Administration*, 301 F. Supp. 796 (S.D.N.Y. 1969). Moreover, we believe that a refusal to permit access to the requested records constitutes a denial of substantive and procedural due process.

As I am sure you have been advised, a hearing on our Motion for a Preliminary Injunction is set for August 20, 1970. In hopes of expediting these proceedings, and saving us each the expense and inconvenience incident to further court proceedings, I am having this letter hand-delivered to you today, with a copy to Mr. Werdig at the United States Attorney's Office. With the August 20th date in mind, I would appreciate the Board's giving our request as prompt attention as is possible.

Very sincerely,

/s/ Burton A. Schwalb
BURTON A. SCHWALB

Enclosure

cc: Robert Werdig, Esquire
(w/enc.)

Aug. 14, 1970

Burton A. Schwalb, Esq.
Messrs. Arent, Fox, Kintner,
Plotkin & Kahn
1100 Federal Bar Building
1815 H Street, NW
Washington, D. C. 20006

Re: David B. Lilly Co., No. 73216-67-A
Delaware Fastener Corp., No. 56322-67-A

Dear Mr. Schwalb:

In accordance with your letter dated August 6, 1970, and RBR 1480.7(e), the Board has reviewed the action of its General Counsel, as set forth in his letter of July 24, 1970 to you, denying your request on behalf of David B. Lilly Co., and Delaware Fastener Corp. for access to records of the Board pursuant to 5 U.S.C. 552.

As a result of such review, the Board has reached the following conclusions:

Item 1

All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

The Board has no such communications.

Item 2

All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.

The Report of Renegotiation is a report made to the regional board by the assigned renegotiator and accountant. The records of the Board show that a copy of the account-

ing section of this report in each of the two proceedings in question was furnished to the contractor involved on February 5, 1970, pursuant to RBR 1472.3(d), and that certain revised pages were sent to each on May 26, 1970.

The remainder (Part II) of each such report is the renegotiator's evaluation of the case; it consists of his analysis and evaluation of the essential facts, in the light of the statutory factors for determining excessive profits; his opinions of the contractor's contentions; and his recommendation to the regional board for a determination with respect to the existence and amount of excessive profits. In the opinion of the Board, this portion of each such report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7).

Item 4

All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delafare Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

It is customary for the Board to solicit reports from higher-tier contractors, if any, whom the contractor served as a subcontractor. Such reports are furnished in confidence, and consist primarily, not of factual material, but of the customers' opinions on various aspects of the contractor's pricing and performance. The disclosure of such reports to the contractor involved would (1) breach the protection promised to the writers, and thus impair the ability of the Board to obtain such reports in the future; and (2) expose to competitors of the contractor, and other interested members of the public, confidential commercial and financial information which in many cases the contractor himself would be least likely to make public. The Board is not concerned with whether such reports may be obtained by discovery in the Tax Court. In declining to divulge them, the Board is motivated by the conviction that their production at the administrative level is not required by the Public Information Act or the Renegotia-

tion Act and would be potentially harmful to their authors, to the Board, and perhaps to the contractor himself because any other member of the public would be equally entitled to such records under the Public Information Act.

Item 3

All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

Item 5

All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

In the opinion of the Board, these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and RBR 1480.9(a)(3), (4), (5) and (7). The legislative history of the Public Information Act, and the decisions thereunder, make it clear that internal Government records of the types described in these two items are not required to be made available to the public for inspection. In *Holly Corporation v. The Renegotiation Board* (Civil No. 69-198-JWC), by an order entered on July 30, 1970, the United States District Court for the Central District of California held that the following records of the Renegotiation Board were exempt from disclosure:

"D. Intra-agency memoranda and other communications consisting of staff advisory opinions, analyses and recommendations. These records include Part II of the Report of Renegotiation * * *."

For the foregoing reasons, the Board declines to comply with your request.

Very truly yours,

NATHAN BASS

Secretary of the Board

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

DAVID B. LILLY COMPANY, INC.
a Delaware Corporation,
for itself and as successor in interest to
DELAWARE FASTENER CORPORATION
a Delaware Corporation,

Plaintiff,

v.

THE RENEGOTIATION BOARD,

Defendant.

Civil Action
No. 2055-70

Affidavit

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

} ss

AFFIDAVIT

I, WILLIAM HENRY HARRISON, being first duly sworn under oath, depose and say:

1. I am the Acting Chairman of the Renegotiation Board and I am familiar with the policies and operations of such Board, including the request of plaintiffs for documents described in its attorney's letter dated June 29, 1970 (Exhibit A to Complaint).

2. By Item I of such letter (Exhibit A to Complaint) plaintiffs requested that the Board make available:

All inter-departmental and inter-agency communications between the Renegotiation Board, its agents, servants, employees or representatives and other governmental agencies, their agents, servants, employees and representatives, in any respect concerning David B. Lilly Company and/or Delaware Fastener Corporation including such communications with respect to their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

The renegotiation file, with respect to plaintiffs, contains no such communications.

By Item II of such letter (Exhibit A to Complaint) plaintiffs requested:

All sections of the Report of Renegotiation prepared by the personnel of the Eastern Regional Renegotiation Board in the referenced renegotiation proceedings.

The Report of Renegotiation is a report made to the regional renegotiation board by the assigned renegotiator and accountant. The Board records, with respect to plaintiffs, show that a copy of the accounting section of this report in each of the two proceedings in question was furnished to the plaintiffs on February 5, 1970, and that certain revised pages were sent to the plaintiffs on May 26, 1970.

The remainder (Part II) of each such report is the renegotiator's evaluation of the case; it consists of his analysis and evaluation of the essential facts, in the light of the statutory factors for determining excessive profits; his opinions of the contractor's contentions; and his recommendations to the regional renegotiation board for a determination with respect to the existence and amount of excessive profits. In the opinion of the Board, the portion of each such report is exempt under 5 U.S.C. 552(b)(3), (4), (5) and (7) and 32 C.F.R. 1480.9(a), (3), (4), (5) and (7).

By Item IV of such letter (exhibit A to Complaint) plaintiffs requested that the Board make available.

All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings.

It is customary for the Board to solicit reports from higher-tier contractors, if any, whom the plaintiffs served as a subcontractor. Such reports are furnished in confidence, and consist primarily, not of factual material, but of the customer's opinions on various aspects of the contractor's pricing and performance. The Board considers that the disclosure of such reports to the plaintiffs would (1) breach the protection promised to the writers of such re-

ports, and thus impair the ability of the Board to obtain such reports in the future; and (2) expose to competitors of the plaintiffs, and other interested members of the public, confidential commercial and financial information which in many cases the plaintiffs themselves would be least likely to make public. In declining to divulge such reports to plaintiffs, the Board is motivated by the conviction that their production is not required under the Public Information Act (5 U.S.C. 552) or the Renegotiation Act (50 U.S.C. App. 1211 et seq.) and would be potentially harmful to their authors, to the Board, and perhaps to the contractor himself, because any other member of the public would be equally entitled to such records under the Public Information Act.

By Items III and V of such letter (Exhibit A to Complaint) plaintiffs requested that the Board make available:

All analyses, memoranda, schedules, and other writings used in comparing David B. Lilly Company and/or Delaware Fastener Corporation with other contractors or subcontractors and reflecting the facts relating to such comparisons.

All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referenced renegotiation proceedings.

The Board considers that these records are exempt from disclosure under 5 U.S.C. 552(b)(3), (4), (5) and (7) and 32 C.F.R. 1480.9(a)(3), (4), (5) and (7).

In the opinion of the Board, the legislative history of the Public Information Act, and the decisions thereunder, make it clear that internal Government records of the types described in these two items are not required to be made available to the public for inspection. In the case of *Holly Corporation v. The Renegotiation Board* (Civil No. 69-198-JWC), by an order entered on July 30, 1970, the United States District Court for the Central District of California held that the following records of the Renegotiation Board were exempt from disclosure:

Intra-agency memoranda and other communications

consisting of staff advisory opinions, analyses and recommendations. These records include Part II of the Report of Renegotiation * * *.

/s/ William Henry Harrison
WILLIAM HENRY HARRISON

Subscribed and sworn to before me, a notary public in and for the District of Columbia, on this day of 1970.

signed:
Notary Public

My commission expires,

(SEAL)

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MAR 12 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,

Petitioner,

vs.

**BANNERCRAFT CLOTHING COMPANY, INC., ASTRO
COMMUNICATION LABORATORY, A DIVISION OF
AIKEN INDUSTRIES, INC., DAVID G. LILLY CO.,
INC.,**

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

**MOTION FOR LEAVE TO FILE A MOTION AMICUS
CURIAE AND MOTION TO POSTPONE ORAL
ARGUMENT ON BEHALF OF SEARS,
ROEBUCK AND CO.**

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**MOTION FOR LEAVE TO FILE A MOTION AMICUS
CURIAE ON BEHALF OF SEARS,
ROEBUCK AND CO.**

Sears, Roebuck and Co. respectfully moves for leave to file a motion, as *amicus curiae*, to postpone oral argument and consideration of the instant case pending the decision of the District of Columbia Court of Appeals on the pending petition for rehearing in *Sears, Roebuck and Co. v. National Labor Relations Board*, _____ F. 2d _____, 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.* In support of this motion, Sears states:

In *Sears*, the District of Columbia Circuit, after finding jurisdiction on the basis of its decision in the instant case, held that there was an insufficient showing of irreparable harm, notwithstanding the National Labor Relations Board's failure to provide public documents under the Freedom of Information Act, 5 U. S. C. § 551, to warrant enjoining pending Board proceedings. In effect, the Court of Appeals, in contrast to the Solicitor General's assertion in his petition for certiorari in this case (p. 9)—that Renegotiation Board and N. L. R. B. proceedings are identical for purposes of the issues here involved—carved out an exception to its decision in the present case for Labor Board matters; the irreparable harm determination in *Sears* is a virtually insurmountable barrier to forestalling determinative N. L. R. B. action until relevant information, which is required to be made available promptly under the Act, is provided. *Sears* originally sought to bring the pendency of *Sears* to the Court's attention by filing a motion for leave to file an *amicus* brief and, attached thereto, a brief in support of the Solicitor General's petition for certiorari. See Exhibit A hereto. Therein, *Sears* suggested that consideration of the Solicitor General's petition be deferred until the expected imminent resolution of the request for rehearing in *Sears*, filed on November 6, 1972, and, in the event of an adverse decision, a reasonable opportunity to submit a petition for certiorari therefrom. Prior to the distribution of this motion and brief to the Court, however, the petition for certiorari was granted. *Sears* now seeks to renew its request, and, accordingly, if granted leave to file a motion, will demonstrate why, in order to resolve all aspects of the question here presented, this Court should determine the present case in conjunction with *Sears*.

For the foregoing reasons, Sears respectfully requests leave to file its annexed motion.

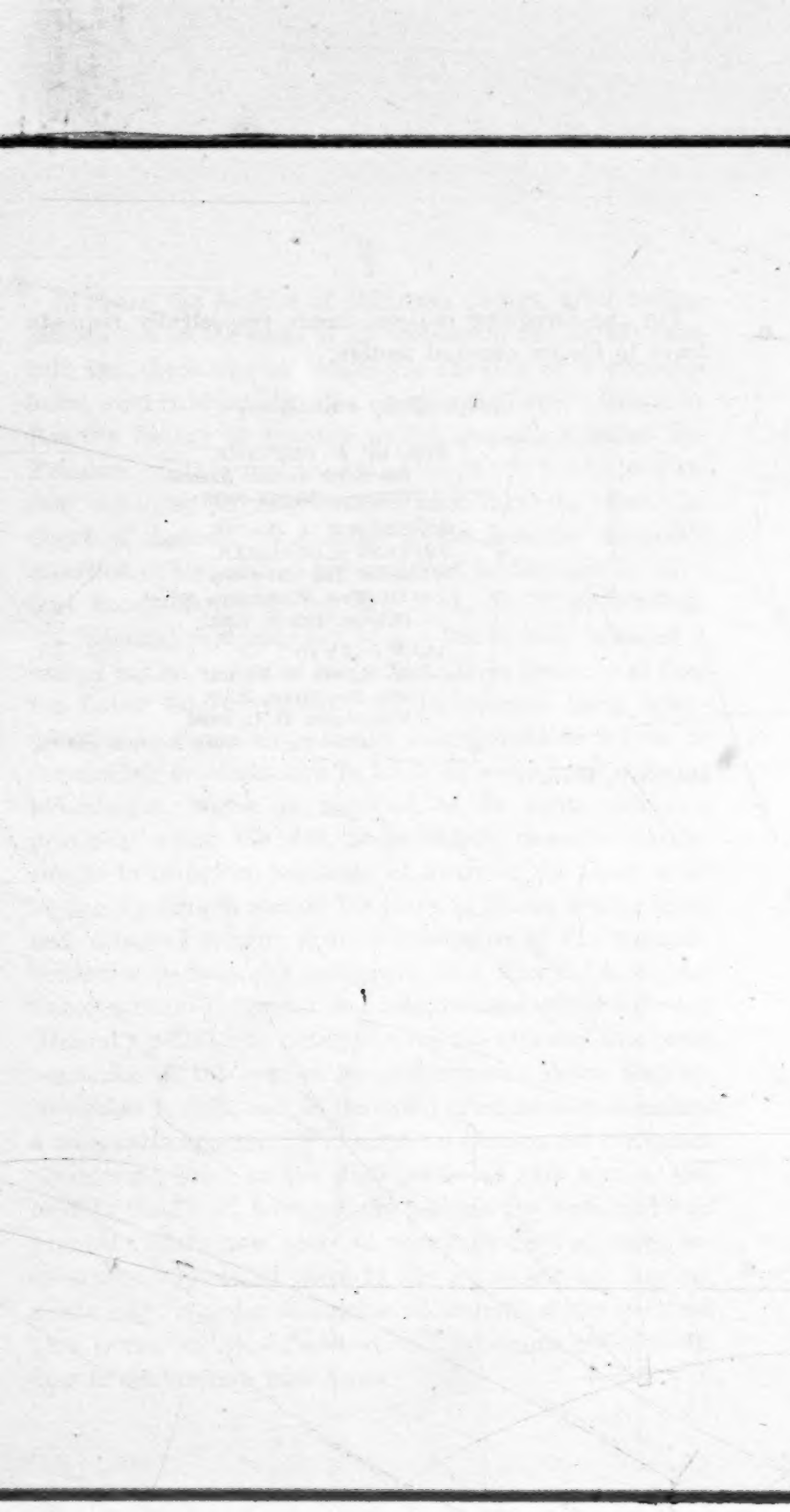
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March 9, 1973.



IN THE
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OCTOBER TERM, 1972.

No. 72-822

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

**MOTION TO POSTPONE ORAL ARGUMENT ON
BEHALF OF SEARS, ROEBUCK AND CO.**

Contingent upon the Court's granting the foregoing motion for leave to file a motion *amicus curiae*, Sears, Roebuck and Co. moves this Court to postpone oral argument and consideration of the instant case pending resolution of the petition for rehearing now awaiting decision before the District of Columbia Court of Appeals in *Sears, Roebuck & Co. v. National Labor Relations Board*, ____ F. 2d ____, 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.*

The interest of Sears is set forth in its annexed motion for leave to file a motion *amicus curiae*. In support of the instant motion, Sears states:

On January 22, 1973, this Court granted *certiorari* in the instant matter to decide whether a federal district court has jurisdiction to enjoin administrative proceedings when the agency fails to provide information in a timely manner under the Freedom of Information Act, 5 U. S. C. § 552 (hereafter the "Act"). An integral part of this significant question is now pending, by reason of the petition for rehearing in *Sears*, before the District of Columbia Court of Appeals—the threshold standard of irreparable harm. Two choices are before the court of appeals: (1) the traditional measure of economic harm followed in *Sears* by a two-judge panel irrespective of the effect of delay upon the right to prompt disclosure contemplated by the Act;¹ or (2) the standard, submitted by Sears, that where (a) no private party objects to enjoining the underlying administrative proceeding, (b) there is no attempt to delay the process of law enforcement, and (c) the agency involved can provide no special reason barring the issuance of an injunction, denying prompt disclosure under the Act must, *as a matter of law*, constitute the requisite irreparable harm.² This Court, should

1. In *Sears*, a two judge panel of the Court of Appeals reiterated the jurisdiction it has conferred in this case; recognized that the prompt disclosure of the documents requested by Sears might be of "significant help" to the Company in the underlying administrative proceeding and would not disadvantage any other party thereto; but nevertheless determined that the Labor Board's denial of such "help" was not sufficient to warrant upholding the injunction of such proceedings which had been granted by the District Court.

2. Sears submits that the latter standard is necessary to effectuate what this Court recently stated to be "judicially enforceable rights" (*Environmental Protection Agency, et al. v. Mink, et al.*, 41 L. W. 4201, 4205 (Jan. 23, 1973)). Cf. *Gomez v. Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The former

it affirm the decision of the court below, will necessarily be confronted with the same question in delineating the extent of a district court's equitable jurisdiction. Consequently, in order to insure that the issue is fully developed by the Court of Appeals before being presented to this Court, Sears respectfully requests that the instant proceeding be postponed until such time as that Court completes its reconsideration of *Sears* and, should that decision be adverse, there is an opportunity to submit a petition for certiorari therefrom.

Where, as here, a case before the Court is intimately related to a pending proceeding before a lower court and both cases are of equal significance, a postponement is appropriate. See *Red Lion Broadcasting Co. v. F. C. C.*, 390 U. S. 916 (1968).³ Such action would, in this instance, insure that the Court's time is not misspent by providing for the resolution of the entire controversy, and allow, by means of the petition for rehearing in *Sears*, the full Court of Appeals to explicate its opinion in the instant case. Accordingly, in view of the imminent resolution of *Sears*, the

criterion totally disregards the recent conclusion of a House Study on the operation of the Act: that the major impediment to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies. Administration of the Freedom of Information Act, H. R. Rep. No. 92-1419, 92d Cong. 2d Sess. (Sept. 20, 1972), pp. 10, 74 and 82-3. Systematic denials of prompt disclosure were thus observed to "result in substantive damage to the plaintiff's case" rendering "totally useless" the eventual disclosure of this "perishable commodity." *Id.* p. 74.

3. In *Red Lion*, this Court, after denying a petition for certiorari before judgment, stayed proceedings pending the disposition of *Radio Television News Directors Ass'n. v. U. S.*, 400 F. 2d 1002 (7th Cir. 1968), and thereafter, upon receiving a petition for certiorari in the latter case, consolidated the two cases. *U. S. v. Radio Television News Directors, et al.*, 393 U. S. 1041 (1969), and see *Red Lion Broadcasting Co., Inc., et. al. v. F. C. C.*, 395 U. S. 367 (1969). In the circumstances of this case, however, should certiorari before judgment in *Sears* be deemed by this Court a preferable procedure in order to avoid delay, Sears would be willing to submit the appropriate petition.

administration of justice will be best served by a short postponement.

For the foregoing reasons, Sears respectfully requests that the oral argument in the instant action be postponed.

Respectfully submitted,

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March 9, 1973.

A1

APPENDIX A

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972.

No. 72-822.

THE RENEGOTIATION BOARD,

Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC., ASTRO COMMUNICA-
TION LABORATORY, A DIVISION OF AIKEN INDUSTRIES, INC.,
DAVID G. LILLY CO., INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT.

BRIEF AMICUS CURIAE ON BEHALF OF SEARS,
ROEBUCK AND CO.

This brief *amicus curiae* is filed on behalf of Sears, Roebuck and Co. contingent upon the Court's granting the foregoing motion for leave to file a brief *amicus curiae*.

INTEREST OF THE AMICUS CURIAE

The interest of Sears is set forth in its annexed motion for leave to file a brief *amicus curiae*.

REASONS FOR GRANTING THE WRIT

1. Sears agrees with the Solicitor General that the question here presented is an important one which warrants review by this Court. The Freedom of Information Act was intended, through a "liberal disclosure requirement," to "increase the citizen's access to government records."¹ Both the failure to provide access at a meaningful date, as well as the failure to provide access altogether, may frustrate this objective. Proceedings under the Act, accordingly, are required to be "expedited in every way." 5 U. S. C. § 552(a)(3). Nevertheless, one of the major impediments to "the efficient operation" of the Act has been "foot-dragging" and "delay" on the part of administrative agencies.² This was the problem the court below confronted in the instant case. It recognized that, in the normal instance where an agency is required to make information available, it will do so with reasonable dispatch. Where, however, as the result of a dispute over the Act's coverage or for other reasons, information is not made promptly available, since such information is "likely to be a perishable commodity", any significant delay "may result in substantive damage to the plaintiff's case" and render the information sought "totally useless."³ Even where this result occurs, there is, of course, no automatic right to equitable relief. There must always be a careful balancing of all interests. The only issue here involved, however, is whether, where there has been the requisite

1. See, e.g., *Getman v. N. L. R. B.*, 450 F. 2d 670, 672 (D. C. Cir. 1971); *Tennessean Newspapers, Inc. v. Federal Housing Admin.*, 464 F. 2d 657 (6th Cir. 1972); *Bristol-Myers Company v. F. T. C.*, 424 F. 2d 935, 938 (D. C. Cir. 1970), *cert. den.*, 400 U. S. 824 (1970); and *Hawkes v. I. R. S.*, 467 F. 2d 787, 791 (6th Cir. 1972).

2. *Administration of the Freedom of Information Act*, H. R. Rep. No. 92-1419, 92d Cong. 2d Sess. (Sept. 20, 1972), pp. 10, 74 and 82-3.

3. *Id.* at 74.

showing of irreparable injury, probable success on the merits and absence of countervailing considerations, a district court may then invoke its power to issue all writs necessary to effectuate its jurisdiction⁴ to achieve a " 'common sense solution' . . . to 'do complete justice . . .'" *Morrow v. District of Columbia*, 417 F. 2d 728, 738 (D. C. Cir. 1969). In order to avoid a severe dislocation in the effectuation of the purposes of the Freedom of Information Act, it is submitted, this Court should affirm that the federal judiciary does, in fact, have this equitable authority.

2. The Sixth Circuit's decision in *Sears, Roebuck and Co. v. N. L. R. B.*, 433 F. 2d 210 (6th Cir. 1970), is not to the contrary. In that case, the court found that "the form of relief which the plaintiff seeks would result in early judicial review of a Board decision on permissible discovery, not an order to produce records." 433 F. 2d at 211. The instant case, by contrast, does not involve any attempt to review administrative decisional processes. Similarly, in *Sears, Roebuck and Co. v. N. L. R. B.*, ____ F. 2d ____, 81 LRRM 2481 (D. C. Cir. Oct. 24, 1972), *pet. reh. pend.*, where the issue was whether N. L. R. B. proceedings should be enjoined until the Board disclosed information sought by a charging party to permit his more effective participation in his own pending unfair labor practice case, there was no effort to obtain an appellate ruling as to the merits of any ruling by the Board. The issue in both instances was limited to the obligation to provide information under the Freedom of Information Act; enjoining administrative processes was only a necessary ancillary means to permit that question to be resolved in a meaningful context. In such a case, it is submitted, the controlling

4. See, e.g., the authorities noted by the court below at App. A of the Petition, pp. 14a-15a; *Eastern Greyhound Lines v. Fusco*, 310 F. 2d 632, 634 (6th Cir. 1962); *Morrow v. District of Columbia*, 417 F. 2d 728, 737-738 (D. C. Cir. 1969); and *Nader v. Volpe*, 466 F. 2d 261, 269 (D. C. Cir. 1972) and the cases therein at n. 54.

precedent is *Skinner & Eddy Corp. v. United States*, 249 U. S. 557 (1919), where district courts were held to have jurisdiction to restrain agency action where, *inter alia*, there is "no effective way of presenting the claim of invalidity at a later date." (emphasis added.) See also *Jewel Companies, Inc. v. F. T. C.*, 432 F. 2d 1155 (7th Cir. 1970).

3. The present Sears case presents an important aspect of the jurisdictional issue raised in *Bannercraft*: what showing of irreparable injury to a plaintiff is required under the Freedom of Information Act to warrant enjoining administrative proceedings. If the standard is that of the traditional injunction case, the impact of the present case will be severely restricted. The denial of the right to prompt disclosure must, as a matter of law, be deemed to constitute an irreparable injury. In such a situation, where there is no countervailing harm to other interests, issuance of a preliminary injunction is the appropriate and, in fact, the only means available to enforce a significant statutory right. Cf. *Gomez v. Florida State Employment Service*, 417 F. 2d 569 (5th Cir. 1969). The irreparable harm issue in *Sears*, in short, is, in view of the acknowledged absence of material difference between Renegotiation Board and N. L. R. B. proceedings (*pet. for cert.*, p. 9), inseparable from the *Bannercraft* jurisdictional issue. It is for this reason that, in the event its request for rehearing is denied, Sears intends to seek certiorari from this Court and will also move to consolidate that petition with the instant petition. It is for that reason also, as well as to afford the Court with a desirable vehicle to consider all aspects of the question presented, that Sears respectfully suggests that consideration of the instant petition be deferred until such time as the District of Columbia Court of Appeals resolves the request for rehearing in *Sears* and, should that decision be adverse, there is an opportunity to submit a petition for certiorari therefrom. See *Red Lion Broadcasting Co. v. F. C. C.*, 390 U. S. 916 (1968).

CONCLUSION

For each of the foregoing reasons Sears respectfully requests that this Court grant the Petition for Certiorari or, in the alternative, defer consideration of the instant petition pending resolution of Sears' Petition for Rehearing before the District of Columbia Court of Appeals in *Sears, Roebuck and Co., v. N. L. R. B. supra.*

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and Co.*

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SUPREME COURT, U. S.

No. 72-322

19

MICHAEL ROSEN, JR.

In the Supreme Court of the United States
OCTOBER TERM, 1972

THE RENEGOTIATION BOARD, PETITIONER

v.

BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RENEGOTIATION BOARD

ERWIN N. GRISWOLD,
Solicitor General,
HARLINGTON WOOD, JR.,
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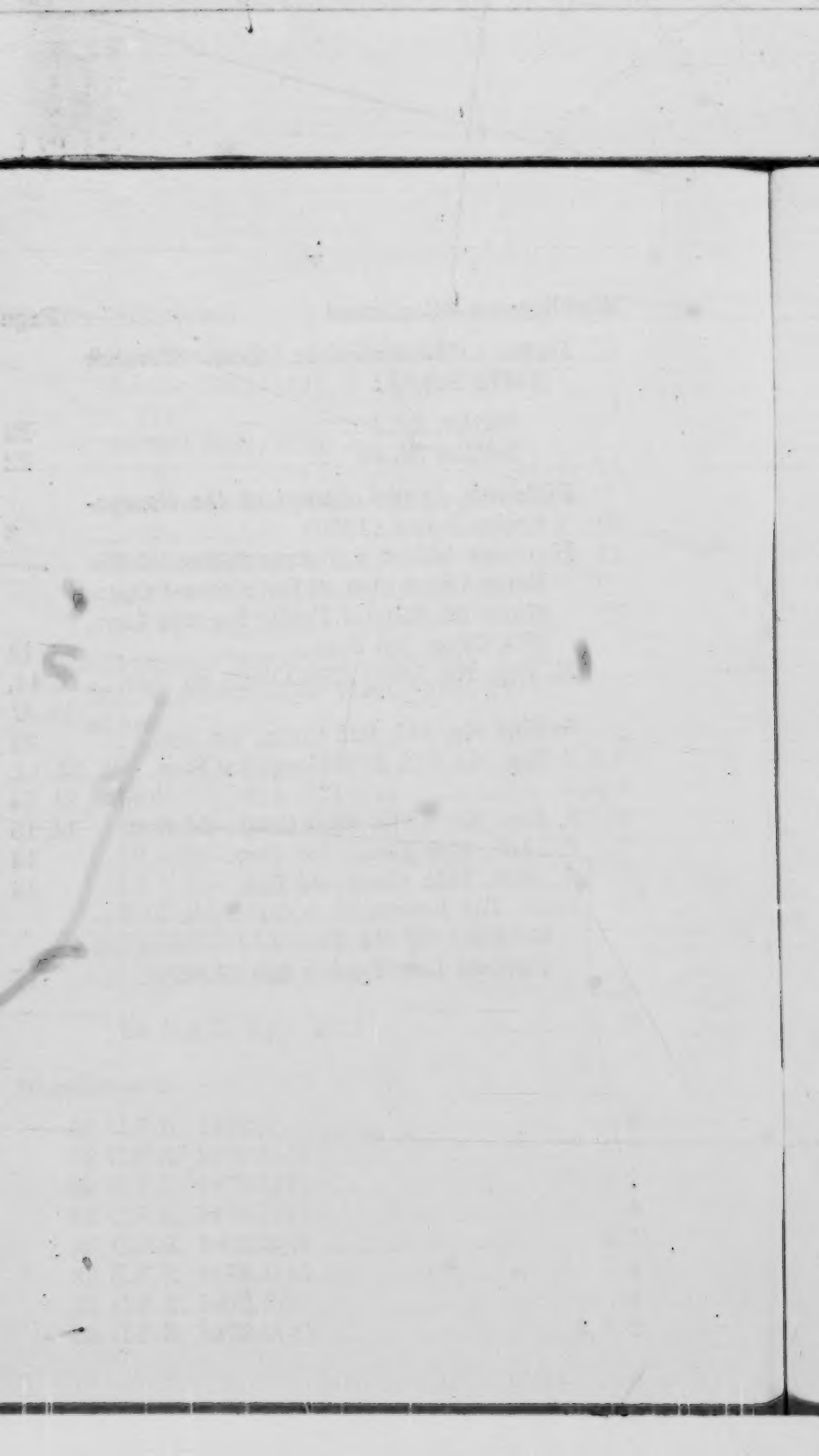
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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-822

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ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY Co., INC.**

***ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT***

BRIEF FOR THE RENEGOTIATION BOARD

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-44a) is reported at 466 F. 2d 345. The orders of the district court (Pet. App. B, pp. 45a-60a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1972. The petition for a writ of certiorari

was filed on December 4, 1972,¹ and was granted on January 22, 1973. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Freedom of Information Act authorizes the district courts to enjoin agency proceedings until the court determines whether litigants before the agency are entitled to documents sought under the Act.

2. If the district court has such jurisdiction, whether it was properly exercised in enjoining proceedings under the Renegotiation Act until the court can determine whether contractors whose profits are being renegotiated are entitled to the documents requested.

STATUTES INVOLVED

The relevant provisions of the Freedom of Information Act, 5 U.S.C. 552, and of the Renegotiation Act, 50 U.S.C. App. 1211, *et seq.*, are set forth in Pet. App. C, pp. 61a-67a.

STATEMENT

1. Respondents are contractors whose profits on defense contracts are undergoing renegotiation pursuant to the Renegotiation Act, 50 U.S.C. App. 1211, *et seq.* That Act provides that the "sound execution

¹ The time for filing the petition for a writ of certiorari was extended by orders of the Chief Justice dated October 4, 1972 and November 8, 1972 until December 4, 1972.

of the national defense program requires the elimination of excessive profits from contracts made with the United States, and from related subcontracts," 50 U.S.C. App. 1211, and establishes the Renegotiation Board as an independent agency in the executive branch to accomplish this objective, 50 U.S.C. App. 1217(a). As its name suggests, the Board operates primarily by informal negotiation with defense contractors rather than by formal hearings;² the Board is directed to "endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits." 50 U.S.C. App. 1215(a).³ These negotiations are to be completed within two years; otherwise, "all liabilities of the contractor or subcontractor for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged * * *." 50 U.S.C. App. 1215 (c).⁴

Where the Board and the contractor are unable to agree upon the amount of excessive profits, the Board may determine these profits. 50 U.S.C. App. 1215 (a). The contractor may then initiate proceedings

² The Board is exempted from the requirements of the Administrative Procedure Act, except for the Public Information section thereof. 50 U.S.C. App. 1221.

³ From its inception during World War II through June, 1970, the Board reached voluntary agreement with the contractor in 88 percent of its cases. *Fifteenth Annual Report of the Renegotiation Board*, December 31, 1970, p. 13.

⁴ Respondents have agreed to suspend this limitation pending resolution of their Freedom of Information Act claims (Pet. App. 30a, n. 12).

in the Court of Claims to determine its indebtedness to the United States.* Such proceedings "shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo." 50 U.S.C. App. 1218.

Renegotiation is initiated by the reference of the contractor's statement to the appropriate Regional Board for investigation. 32 C.F.R. 1472.3. The renegotiation process encompasses several levels in the agency: first, Regional Board staff, then a panel of the Regional Board, the Regional Board itself, a division of the Renegotiation Board, and finally the Renegotiation Board itself. At each level, there is consultation with the contractor, preparation of a report and analysis of the consultation, and submission to the next higher level of a recommendation with respect to the excess profits to be assessed (32 C.F.R. 1472.3(d); 32 C.F.R. 1472.3(f)-(i); 32 C.F.R. 1472.4(b)-(d)). At each stage, the contractor is entitled, at the time he learns of the recommendation concerning his excess profits, to a statement of the basis for the recommendation (32 C.F.R. 1472.3(f); 32 C.F.R. 1472.3(i); 32 C.F.R. 1472.4(d)). No level is bound by the determination of the level below; the recommended settlement may increase or decrease at each level (32 C.F.R. 1472.3(h); 32 C.F.R. 1472.3(i); 32 C.F.R. 1472.4(b); 32 C.F.R. 1472.4(d)).

* Until 1971, such proceedings were conducted in the Tax Court. P.L. 92-41, 85 Stat. 97, amended the Renegotiation Act to substitute the Court of Claims for the Tax Court.

If no agreement is reached, the Board issues an order determining the amount of the contractor's excess profits (32 C.F.R. 1472.4(d)), and at the contractor's request, furnishes him "with a statement of such determination, of the facts used as a basis therefor, and of its reasons for such determination." 50 U.S.C. App. 1215(a); see 32 C.F.R. 1472.4(d). The Renegotiation Act provides that "Such statement shall not be used" in the Court of Claims "as proof of the facts or conclusions stated therein." 50 U.S.C. App. 1215(a).

2. During renegotiation proceedings, the respondent contractors requested a number of documents from the Renegotiation Board under the Freedom of Information Act, 5 U.S.C. 552(a)(3).^{*} The Board supplied certain of the documents sought, but refused to release others, including staff reports analyzing the basis for the staff's recommendation on the

^{*} Astro Communication Laboratory requested, *inter alia*, the recommendations contained in the renegotiation report prepared by the Regional Board staff, and "all records, analyses, determinations, opinions, reports, or summaries" bearing upon the renegotiation of its profits (App. 6-7). Bannercraft Clothing Company sought, *inter alia*, all communications between government agencies regarding Bannercraft's performance of its contracts, and the disposition of renegotiation proceedings involving a number of its competitors (App. 32-33). David B. Lilly Co. sought, *inter alia*, the recommendations contained in the renegotiation report, material supplied by other government agencies, and "All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board" in its case (App. 73-74).

amount of excess profits involved (App. 11-13, 52-59, 94-96, 99-101).

The contractors then filed suit in the district court under the Freedom of Information Act to compel disclosure; they also sought an injunction against further renegotiation proceedings pending a decision on the merits of their Information Act claims (Pet. App. A, pp. 3a-4a). The contractors alleged that the continuation of renegotiation proceedings without disclosure of those documents would deny them due process of law (App. 40, 4, 70).¹ The district court granted each of the requested injunctions without opinion (Pet. App. B, pp. 45a-60a).

The court of appeals, one judge dissenting, affirmed. It held that (1) the Freedom of Information Act grants jurisdiction to enter such injunctions, and (2) the exercise of such jurisdiction was proper when the contractors were engaged in renegotiation under the Renegotiation Act (Pet. App. A, pp. 4a-5a).

The court began by analyzing the Renegotiation Act, concluding that contractors undergoing renegotiation need documents in the Board's possession to learn "the strength of the Board's case against them

¹ At the time these actions were brought, David B. Lilly Co. was meeting with regional board staff who had tentatively determined that the company had realized excess profits of \$700,000, the Eastern Regional Board had tentatively determined that Astro Communication Laboratory had realized excess profits of \$225,000, and the Renegotiation Board had ruled that Bannerkraft Clothing Company had realized excess profits totalling \$1,625,000, but no final order had been entered pending further negotiation (Pet. App. A, p. 9a).

and the facts on which the Board relies in assessing liability.”*

The court then held that the Information Act implicitly confers jurisdiction to issue the injunctions (Pet. App. A, pp. 11a-16a), since a subsidiary purpose of the Act was to protect “those forced to litigate with agencies on the basis of secret laws or incomplete information” (Pet. App. A, p. 12a). The court also concluded that in enacting the statute, Congress intended to confer broad equitable jurisdiction upon the district courts (Pet. App. A, pp. 13a-14a). Without discussing the specific sanctions provided in each of the disclosure sections of the Information Act, the court concluded that jurisdiction to enjoin agency proceedings existed because this “may be necessary on occasion to enforce the policy of the Freedom of Information Act * * *” (Pet. App. A, p. 16a).

Turning to the exhaustion-of-remedies question, the court concluded that requiring the contractors to com-

* The court's discussion of the procedures followed under the Act and regulations omits any mention of the contractor's right to be informed of the basis for the Board's action at each stage of the proceedings. As summarized above, the Board's regulations give the contractor the right to obtain the accounting section of the report of renegotiation, 32 C.F.R. 1472.3(d); the right to be informed of the reasons for the tentative recommendation by the regional board personnel, 32 C.F.R. 1472.3(f); the right to a summary of facts and reasons for the Regional Board's final determination, 32 C.F.R. 1472.3(i); the right to a summary of facts and reasons for the Board's final determination, 32 C.F.R. 1472.4(d); and the right to a statement of the facts and reasons when a final order is entered by the Board; 50 U.S.C. App. 1215(a); 32 C.F.R. 1472.4(d).

plete the statutorily prescribed administrative proceedings was unnecessary because "no legitimate judicial policy would be served by depriving these appellees of the relief they seek" (Pet. App. A, p. 19a). The court reasoned that the contractors need only exhaust their administrative remedies under the Information Act, and not their remedies under the Renegotiation Act, prior to requesting injunctive relief against renegotiation proceedings (Pet. App. A, pp. 21a-26a). It found their remedies before the Board and in *de novo* proceedings in the Court of Claims inadequate, precisely because the contractors could not there raise the claim that denial of the documents sought deprived them of due process before the Board, due to the fact that the Court of Claims proceedings are conducted *de novo* (Pet. App. A, p. 22a).

The dissenting judge concluded that the Freedom of Information Act's creation of a specific right with a specific remedy to enforce it—i.e., ordering disclosure of any matter improperly withheld—rendered that remedy exclusive (Pet. App. A, pp. 32a-39a). He found no "suggestion that Congress had any special interest in or concern with litigants before the administrative agencies" (Pet. App. A, pp. 35a-36a). He also found improper the majority's reliance upon decisions indicating that the conferring of equity jurisdiction is intended to cover the full scope of equity power, for the relief

accorded by the majority is relief allegedly made necessary by the *special needs* of the appellees—a basis for relief to which the remedies of the

Information Act were not addressed. In such circumstances, litigants with *special needs* constitute a class of persons that the remedies of the Information Act did not intend to accommodate * * *. [Pet. App. A, p. 37a.]

Disagreeing also with the majority's view of exhaustion, the dissenting judge believed that the court's position "seriously misconstrues the intended functioning of the Renegotiation Board's procedures—controlled access to information concerning the Government's position in the negotiations plays a significant role in the administrative process before the Board" (Pet. App. A, p. 41a). The interruption of these proceedings by an injunction under the Information Act, he believed, frustrated the Renegotiation Act's basic purposes. The dissent concluded that these cases involved not a request for relief under the Information Act but "a challenge to the Board's procedures themselves" (Pet. App. A, p. 42a); and that the decisions of this Court requiring the Renegotiation Act remedies to be exhausted are therefore controlling."

SUMMARY OF ARGUMENT

The Freedom of Information Act directs that certain agency records be made available to the public, and contains specific provisions to assure that avail-

* *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752; *Lichter v. United States*, 334 U.S. 742; *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540.

ability with minimum interference with agency activities. The district courts are authorized to compel production of improperly withheld agency records. These provisions are designed to assure prompt judicial consideration of agency refusals to make documents available, but they do not include a grant of jurisdiction to enjoin agency proceedings pending such consideration.

To read such jurisdiction into the Act by implication is neither consistent with the statutory language nor necessary to effectuate the Act's purposes. The interference with ongoing proceedings necessarily involved would upset the balance struck in the Freedom of Information Act between the public's right to have access to agency records and the need for efficient agency action. Moreover, it would do so to further the special interests of parties before the agency, a class the Freedom of Information Act was not designed to protect.

In permitting the interruption of renegotiation prior to the exhaustion of the prescribed administrative and judicial proceedings, the decision below also misconstrues the Renegotiation Act, and is contrary to the rulings of this Court. The Act contemplates informal negotiations, leading to prompt voluntary agreements on appropriate refunds, with *de novo* judicial consideration if the negotiations are unsuccessful. This Court has recognized the congressional intention to expedite the renegotiation process, and has refused to permit the enjoining of renegotiation proceedings even when, as here, the contractor alleged that the Board's refusal to disclose the data upon

which it relied denied due process, *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752. It has also held that the opportunity for a *de novo* hearing before the Tax Court (now the Court of Claims) satisfies due process, *Lichter v. United States*, 334 U.S. 742.

The court below misconstrued the Renegotiation Act in concluding that the release of the documents sought, including internal Board memoranda, may be necessary to permit meaningful negotiation between the parties. In contrast to litigation, in which comprehensive discovery is appropriate at an early stage, the renegotiation process contemplated by the Act involves the carefully controlled disclosure at various stages during the negotiation process of the basis for the government's offers of settlement. The court below incorrectly ignored both the difference between negotiation and litigation, and the contribution of the limitation on disclosures to the bargaining strength of the Board.

ARGUMENT

I

THE FREEDOM OF INFORMATION ACT DOES NOT AUTHORIZE THE COURTS TO ENJOIN AGENCY PROCEEDINGS UNTIL CLAIMS FOR DOCUMENTS SOUGHT THEREUNDER ARE RESOLVED.

A. Congress Intended the Provision for Judicial Orders Directing Production of Agency Records to be the Exclusive Method for Enforcing the Disclosure Requirements of the Act.

In the Freedom of Information Act,¹⁰ Congress sought "to provide a true Federal public records statute by requiring the availability, to any member of the public, of all of the executive branch records described in its requirements" except those specifically exempted. H. Rep. No. 1497, 89th Cong., 2d Sess., p. 1 (hereafter "H. Rep. No. 1497"). The basic reason for the Freedom of Information Act was congressional concern that "[a]lthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information." S. Rep. No. 813, 89th Cong., 1st Sess., p. 3 (hereafter "S. Rep. No. 813"). Accordingly, the Act's "ultimate purpose was to enable the public to have sufficient information in order

¹⁰ Originally enacted in 1966 as P.L. 89-487, 80 Stat. 250, the Act was codified in 5 U.S.C. 552 by P.L. 90-23, 81 Stat. 54. The Act substantially revised Section 3, the public information section, of the Administrative Procedure Act, 5 U.S.C. (1964 ed.) 1002.

to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Frankel v. Securities and Exchange Commission*, 460 F. 2d 813, 816 (C.A. 2), certiorari denied, 409 U.S. 889; see *Soucie v. David*, 448 F. 2d 1067, 1076 (C.A.D.C.).

Concerned that the Act might not accomplish its purpose without provisions to insure compliance, S. Rep. No. 813, at 3, Congress created "a judicially enforceable public right to secure such information from possibly unwilling official hands." *Environmental Protection Agency v. Mink*, No. 71-909, decided January 22, 1973, slip op. p. 6.¹¹ Congress authorized the district courts to "order the production of any agency records improperly withheld" and to "punish for contempt the responsible employee" if such order is not obeyed. 5 U.S.C. 552(a)(3).

Congress further provided that the enforcement proceedings in the district court be *de novo*, placed the burden upon the government to justify any refusal to produce documents, and directed that proceedings in the district court "take precedence on the docket over all other causes and shall be assigned

¹¹ Although the suggestion was made, in the House hearings preceding adoption of the Information Act, that review be covered in the general judicial review provisions of the Administrative Procedure Act, Congress instead wrote a specific grant of jurisdiction into the Act. See Hearings before a Subcommittee of the House Committee on Government Operations on Federal Public Records Law, 89th Cong., 1st Sess., March-April, 1965, at 107-109.

for hearing and trial at the earliest practicable date and expedited in every way." *Id.* Thus the Act, as the House Committee report points out, "contains a specific remedy for any improper withholding of agency records by granting the U.S. district courts jurisdiction to order the production of agency records improperly withheld." H. Rep. No. 1497, at 9; see S. Rep. No. 813, at 8.¹²

This "specific remedy" in its present form was added to the legislation which ultimately became the Freedom of Information Act by amendments proposed by the Senate Committee on the Judiciary. See S. Rep. No. 1219, 88th Cong., 2d Sess., p. 3.¹³ The Committee report explains:

The provision for enjoining an agency from further withholding is placed in the statute to make clear that the district courts shall have this power.

¹² The other disclosure provisions of the Act, dealing with material required to be published in the Federal Register (5 U.S.C. 552(a)(1)) and agency opinions, statements and manuals which must be made available (5 U.S.C. 552(a)(2)), contain, in addition, their own specific methods of enforcement. These sections provide that a person may not be bound by an item required to be published in the Federal Register and not so published, and that an order or opinion which has not been made available or indexed may not be cited against a person by the agency.

¹³ S. 1666, 88th Cong., 2d Sess., passed the Senate in the 88th Congress too late to be considered by the House of Representatives. In the 89th Congress S. 1160, which "is substantially S. 1666," was introduced and became the Information Act. See S. Rep. No. 813, at 4. No changes were made in the judicial remedies provided.

* * * This [amendment] has been made to avoid any possible misunderstanding as to the courts' powers.

Further, this change would give precedence to actions for withholding [sic]. Without this, the remedy might be of little practical value.

S. Rep. No. 1219, *supra*, at 7. This remedy, like the substantive exemption provisions, reflects the congressional purpose of "providing a workable formula which encompasses, balances, and protects all interests * * *." S. Rep. No. 813, at 3.

In the Freedom of Information Act Congress thus has created a right and has provided a special remedy for enforcing that right, which therefore "is exclusive." *United States v. Babcock*, 250 U.S. 328, 330-331. Congress

decided upon the method for the protection of the "right" which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end. [*Switchmen's Union v. National Mediation Board*, 320 U.S. 297, 301.]

Accordingly, this is not a situation where "Congress has utilized * * * the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest," *Porter v. Warner Holding Co.*, 328 U.S. 395, 403. Nor, since the purpose of the statute is to make government records available to the public, is the exercise of this jurisdiction necessary to give effect to the policy of the legislature.

See *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292. Instead, as this Court observed in *Environmental Protection Agency v. Mink*, *supra*, at 13, n. 13,

* * * in actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions—short of compelled disclosure—such as striking a particular defense or dismissing the Government's action.

For the same reasons, the Information Act does not empower the courts to impose the additional equitable sanction of enjoining administrative proceedings until documents sought under that Act are produced. Congress intended the issuance of orders compelling production to be the sole method of judicial enforcement of the Act.

Except for a subsequent decision of the District of Columbia Circuit relying on the present case (*Sears, Roebuck & Co. v. National Labor Relations Board*, 473 F. 2d 91, 93, petition for certiorari pending, No. 72-1503¹⁴), the federal courts have uniformly held that they have no power to enjoin agency proceedings pending the disposition of a claim under the Information Act. *Sears, Roebuck & Co. v. National Labor Relations Board*, 433 F.2d 210 (C.A. 6); *Missouri-Portland Cement Co. v. Federal Trade Commission*, D.D.C., No. 474-71, decided August 16,

¹⁴ Although the court there stated that the district court had jurisdiction to enjoin agency proceedings, it concluded that, in the circumstances of that case, an injunction was improper, since irreparable harm had not been shown.

1972; *General Manufacturing Corp. v. The Renegotiation Board*, D. N.J., No. 965-70, decided November 5, 1970; *Grumman Corporation v. The Renegotiation Board*, D.D.C., No. 3097-70, decided October 20, 1970, appeal dismissed, C.A.D.C., No. 27726, decided October 27, 1970; *Holly Corporation v. The Renegotiation Board*, C.D. Calif., No. 69-198, decided February 11, 1969; see *Sterling Drug Inc. v. Federal Trade Commission*, 450 F.2d 698 (C.A.D.C.); *Bristol-Myers Co. v. Federal Trade Commission*, 424 F.2d 935 (C.A. D.C.), certiorari denied, 400 U.S. 824.¹⁵

The Sixth Circuit refused to enjoin proceedings before the National Labor Relations Board until documents which the plaintiff sought to use in Board proceedings were produced under the Information Act. *Sears, Roebuck & Co. v. National Labor Relations Board*, 433 F.2d 210.¹⁶ There the court, recognizing that the Information Act claim essentially sought to inject the district court into the administrative process at an inappropriate point, stated (433 F.2d at 211):

The district court was correct in concluding that it was without jurisdiction. The prayer for relief contained in plaintiff's complaint requested the court to enjoin further proceedings of the Na-

¹⁵ See Note, *The Information Act: Judicial Enforcement of the Records Provision*, 54 Virginia Law Review, 466, 472-476 (1968), approving this conclusion.

¹⁶ The court in this case noted the *Sears* decision. Pet. App. A, p. 2a. But the court did not discuss or distinguish *Sears*, although the case was heavily relied on by the Board. Appellant's Brief at 9, 3A-6A; reply brief, 5-6.

tional Labor Relations Board pending final decision on its complaint * * *. Essentially, the form of relief plaintiff seeks would result in early judicial review of a Board decision on permissible discovery, not an order to produce records. Plaintiff contends that jurisdiction for such an action is granted to the district courts by the Freedom of Information Act, 5 U.S.C.A. § 552 (a) (3), which grants " * * * jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records * * *." Even assuming the dubious proposition that Congress intended to create an exception to its long-standing policy against enjoining the Board, plaintiff seeks neither an injunction nor an order of the type described above. We therefore conclude that the district court properly dismissed the complaint for lack of jurisdiction * * *.

Although there are distinctions between proceedings before the Renegotiation Board and before the National Labor Relations Board, these differences are irrelevant to the question whether the Freedom of Information Act authorizes the courts to enjoin administrative proceedings where it is alleged that the agency has not complied with the disclosure requirements of the Act.¹⁷ The respondents here make es-

¹⁷ If a litigant's need were a relevant consideration, the plaintiff's need for the documents in *Sears* might have been greater than that of respondents here, because the review of the Labor Board decision is based upon the administrative record, and *Sears* would therefore have been limited to that record in challenging the agency's decision. Under the Rene-

sentially the same allegations with regard to jurisdiction as were made in *Sears*; in neither case does the Information Act confer jurisdiction to enjoin pending agency proceedings.

The court of appeals' reliance upon an alleged congressional purpose to benefit litigants before administrative agencies reflected in subsection 552(a) (2) of the Act, which requires the publication and indexing of agency orders, opinions, statements of policy, interpretations and staff manuals (Pet. App. A, pp. 12a-13a), is unpersuasive. As the dissent points out, that section is "solely concerned with the existence of 'secret law' rather than any 'incomplete information' that might be useful to a citizen involved in controversy with an agency" (Pet. App. A, p. 35a). It deals only with agency holdings which affect all members of the public who are potential litigants, and not with the particular material of an individual litigant's case. As explained in H. Rep. No. 1497, at 7, "[t]his material is the end product of Federal administration. It has the force and effect of law in most cases, yet under the present statute these Federal agency decisions have been kept secret from the members of the public affected by the decisions."

Moreover, this section "contains its own sanction that orders, opinions, etc., which are not properly

gotiation Act, however, each respondent is entitled to a *de novo* hearing in the Court of Claims, where he is not bound in any manner by the Board's determination.

indexed and made available to the public may not be relied upon or cited as precedent by an agency." S. Rep. No. 813, at 7. This remedy, together with that provided in subsection 552(a)(3), adequately protects the interests of litigants before an agency; its existence confirms that the Information Act does not authorize the courts to enjoin agency proceedings.

B. The Congressional Purpose in the Act was to Enable the Public to Obtain Information From the Government, not to Enable Litigants to Obtain Information From an Agency for Use in Their Case Before the Agency.

There is nothing in the Act or its legislative history to suggest that Congress intended to permit the courts to enjoin an ongoing administrative proceeding pending a determination whether documents sought under the Information Act for use in that proceeding must be made available. To imply such authority would be inconsistent with the basic purpose of the Act, which was to enable the public generally to obtain information from the government, but not to aid a particular litigant in conducting his case before the agency. As the dissenting judge below correctly pointed out, the injunction

is relief allegedly made necessary by the *special needs* of the appellees—a basis for relief to which the remedies of the Information Act were not addressed. In such circumstances, litigants with *special needs* constitute a class of persons that the remedies of the Information Act did not intend to accommodate * * *. [Emphasis in original; Pet. App. A, p. 37a.]

Congress did not intend to provide litigants before an agency with any rights, such as the right to stop the agency's processes until documents are produced, greater than those given the general public. The legislative history of the Act suggests the contrary, since Congress broadened the disclosure of public records contained in the Administrative Procedure Act that was limited to "persons properly and directly concerned" (5 U.S.C. (1964 ed.) 1002(c)), to provide that information be made available "to the public," "for public inspection," and "to any person." 5 U.S.C. 552(a), (a)(2), (a)(3), (c); see *Environmental Protection Agency v. Mink*, *supra*, at 6. Congress made this change to recognize the "basic right of any person—not just those special classes 'properly and directly concerned'—to gain access to the records of official Government actions," and to establish "the basic principle of a public records law by making the records available to any person." H. Rep. No. 1497, at 5, 8; see also S. Rep. No. 813, at 5-6.

For these reasons, the Freedom of Information Act does not "by its terms, permit inquiry into particularized needs of the individual seeking the information * * *." *Environmental Protection Agency v. Mink*, *supra*, at 13.¹⁸ Professor Davis points out that

¹⁸ The courts of appeals have indicated that "[b]y directing disclosure to any person, the Act precludes consideration of the interests of the party seeking relief." *Soucie v. David*, *supra*, 448 F. 2d at 1077; *Sterling Drug Inc. v. Federal Trade Commission*, *supra*, 450 F. 2d at 705. Since disclosure required by the Act does not depend upon the particular needs of litigants, the remedies provided by Congress to enforce

the Act's history emphasizes that "required disclosure under the Act can never depend upon the interest or lack of interest of the party seeking disclosure * * *," because the Act "never takes into account the need of the party seeking disclosure * * *." Davis, *Administrative Law Treatise* (1970 Supp.), §§ 3A.4, at 120; 3A.29, at 171."

It was precisely upon the basis of their "particularized needs," however, that the respondents sought and the court of appeals sustained the injunction against the conduct of further Board proceedings until the issues under the Freedom of Information Act had been resolved. The respondents sought the material from the Board not because it was material to which the public was entitled under the Act, but because they believed it would aid them in conducting the renegotiation procedures in which they were engaged. The injunction is basically designed to aid the respondents in conducting their cases before the Board, not to further the public interest in disclosure of government information. As such, it is inconsis-

disclosure should not be expanded to protect the particular interests of litigants.

¹⁹ The court below, in *Getman v. National Labor Relations Board*, 450 F. 2d 670 (Wright, J.), recognized that "[a]ny discretionary balancing of competing interests will necessarily be inconsistent with the purpose of the Act to give agencies, and courts as well, definitive guidelines in setting information policies," *id.* at 674, n. 10. The court in *Getman* concluded that the explicit language of one exemption required this balancing; but it emphasized that this conclusion was limited to that language alone, *id.* at 674, n. 10; 677, n. 24.

tent with the fundamental purpose of the Freedom of Information Act.

Moreover, permitting such injunctions will encourage parties to attempt to delay administrative proceedings by resort to preliminary litigation over Freedom of Information Act claims. In these cases, for example, the Renegotiation Board and the appropriate Regional Board had tentatively determined that respondents had realized excessive profits on government defense contracts in excess of \$2.5 million (Pet. App. A, p. 9a). Under the Renegotiation Act, the government may not take action to recover excess profits until renegotiation proceedings are completed and a final order has been entered; similarly, interest on the amounts ultimately found due does not begin to run until thirty days after such order is entered. 50 U.S.C. App. 1215(b) (1), (2). Thus, the contractor against whom a tentative determination of excessive profits has been made has a substantial incentive to seek delay of renegotiation proceedings to whatever extent possible.²⁰

The court of appeals believed that the delay involved would generally be insubstantial, so that the granting of injunctive relief would not materially interfere with agency proceedings. But then an injunction would be unnecessary—and particularly so here, where at least *Astro Communication* and *Lilly*

²⁰ In these cases, temporary restraining orders were entered on the day the complaint was filed in *Lilly*, and within five and nine days respectively of the filings in *Bannercraft* and *Astro Communication*. Shortly thereafter, they were made preliminary injunctions.

Co. were at the earliest stages of renegotiation proceedings. In fact, however, broad-scale requests for documents under the Freedom of Information Act have usually been resolved only after at least one appeal. See, e.g., *Environmental Protection Agency v. Mink*, No. 71-909, decided January 22, 1973; *Sterling Drug Inc. v. Federal Trade Commission*, 450 F. 2d 698 (C.A.D.C.).²¹ Furthermore, the interference with agency proceedings lies not only in delay, but also in the opportunity provided to use the Information Act as a discovery tool in administrative hearings, with premature judicial review. Cf. *Sears, Roebuck & Co. v. National Labor Relations Board*, *supra*, 433 F. 2d at 211. The Information Act was not enacted for that purpose.

Our emphasis on the impropriety of enjoining Board proceedings pending a judicial determination regarding the availability of the documents involved under the Act should not be interpreted as indicating any doubt that the Act permits the withholding of these documents.

²¹ Even when the same issue as the one in this case subsequently arose in the same circuit, the case reached the court of appeals, and is currently the subject of a petition for certiorari in this Court (No. 72-1503), *Sears, Roebuck & Co. v. National Labor Relations Board*, 473 F. 2d 91. The court's conclusion there that the issuance of an injunction was inappropriate under the particular facts of that case demonstrates that the decision that jurisdiction exists to issue injunctions will encourage lengthy litigation, rather than establishing a right which will obviate the need for further litigation.

The court below pointed out that the issue whether the Act requires the disclosure of the documents respondents sought was not before it (Pet. App. A, p. 3a). That issue is still to be determined by the district court. It is our position, however, that some of the requests of respondents were so vague that they did not constitute "request[s] for identifiable records" (5 U.S.C. 552(a)(3)).²² Others sought records which were exempt from disclosure under 5 U.S.C. 552(b)(4), as privileged commercial information,²³ or under 5 U.S.C. 552(b)(5), as inter-agency or intra-agency advisory memoranda (App. 32, 74).²⁴

²² For example, Astro Communication Laboratory sought:

All documents in the Renegotiation Board file or in the file of the Eastern Regional Renegotiation Board of the captioned fiscal year of Astro Communications Laboratory, which documents analyze, summarize, discuss, relate to, or in any way bear upon Astro Communications' treatment, recording, reporting, control, or allocation of selling expenses including selling commission expense, advertising expense, operating loss carry-forwards, and corporate management fees. [App. 6.]

²³ For example, Lilly requested:

All written communications between the Renegotiation Board, its agents, servants, employees or representatives and firms holding renegotiable contracts or subcontracts in any way concerning David B. Lilly Company and/or Delaware Fastener Corporation and their performance of any of the renegotiable contracts now the subject of the referenced renegotiation proceedings. [App. 73.]

²⁴ For example, Bannerkraft requested:

Interdepartmental and interagency communications between The Renegotiation Board and other Government

Perhaps other specific exemptions in the Act are also applicable to certain of the documents requested.²⁵

Thus, though the questions under the Freedom of Information Act itself are not now before the Court, it is evident that the questions raised are substantial, and that the government's defense on the merits of this case is far from frivolous.

agencies with respect to Bannercraft's bidding, award and performance of its renegotiable contracts for the fiscal years 1966 and 1968. [App. 32.]

Lilly also requested:

All intra-agency memoranda and written communications consisting of recommendations and/or analyses prepared by personnel or members of the Renegotiation Board or the Eastern Regional Renegotiation Board in connection with the referred renegotiation proceedings. [App. 74.]

²⁵ In two of the cases the district court concluded, on the basis of *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 425 F. 2d 578 (C.A.D.C.), that an injunction was proper because it was likely plaintiffs would be successful in their attempt to compel disclosure of the records (Pet. App. B, pp. 46a, 48a). But in *Grumman*, the contractor specifically disavowed any request for access to advisory memoranda (425 F. 2d at 581), and the court concluded that "reports submitted by the prime contractor on Grumman's performance" (similar to some of the documents requested here, App. 100) would have to be reviewed by the district court to determine whether they were exempt from disclosure under 552(b)(4). 425 F. 2d at 582. Thus, *Grumman* leaves open many questions which the district court will have to resolve to determine whether respondents are entitled to disclosure of the documents they seek.

II

THE INJUNCTION AGAINST FURTHER PROCEEDINGS BEFORE THE RENEGOTIATION BOARD CONSTITUTES AN IMPROPER JUDICIAL INTERFERENCE WITH THE BOARD'S ADMINISTRATIVE PROCESS WHICH THE RENEGOTIATION ACT DOES NOT PERMIT.

This Court has three times held that litigants before the Renegotiation Board cannot get the Board's proceedings enjoined, even on constitutional grounds, prior to exhaustion of their administrative remedies before the agency. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752; *Lichter v. United States*, 334 U.S. 742; *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540. That principle is fully applicable to these cases. There is nothing in the Freedom of Information Act that warrants creating an exception to the principle on the basis of the respondents' contention that denying them access to Board records whose disclosure the latter Act allegedly requires would deny them due process.

Those cases hold that the courts have no authority or "lawful function" ²² to enjoin renegotiation proceedings prior to the completion of the statutory judicial proceedings before the Tax Court (now the Court of Claims), regardless of whether the renegotiation proceedings are challenged on constitutional (*Aircraft, Lichter*), statutory (*Macauley*) or procedural (*Lichter*) grounds. This Court's reasoning was that

²² *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*, 331 U.S. at 767.

the contractor is afforded a due process hearing on the question of excessive profits by the *de novo* proceedings before the Tax Court, and that until that court has decided the question an injunction "would violate the 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Maccauley v. Waterman Steamship Corp.*, *supra*, 327 U.S. at 543, quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51.

The Court's decisions reflect the congressional purposes and policy in renegotiation matters, for "the exhaustion problem and that of equity jurisdiction * * * both are colored by the relevant specific provisions of the Renegotiation Acts * * *." *Aircraft*, *supra*, 331 U.S. at 764.²⁷ Under the Renegotiation Act, proceedings before the Board are directed to informal renegotiation, and give the parties an opportunity to reach an agreement, or, if this is impossible, permit the Board to determine excess profits. The proceedings are to be "expeditiously resolved" by the Board, in light of the "primary need for speed and definiteness in these matters (*Lichter*, *supra*, 334 U.S. at 791). In fact, the statute's

entire structure indicates the congressional purpose to have matters of renegotiation promptly

²⁷ Accord, e.g., *McKart v. United States*, 395 U.S. 185, 193 ("Application of the doctrine [of exhaustion] to specific cases requires an understanding of its purposes and of the particular administrative scheme involved").

and expeditiously settled; and to accomplish this as far as possible both by informal negotiations and by introducing the compulsion of finality at every stage unless each succeeding one is taken as commanded. * * *

At the height of the war Congress recognized * * * that speed in procurement, and consequently in production of war materials, outweighed all other considerations normally applicable. [Renegotiation problems often] worked to hinder and delay the process of procurement. Congress therefore sought, so far as possible, to relieve the interrelated processes from the tedious burden of litigation. [*Aircraft, supra*, 331 U.S. at 770]

Once the initial administrative proceedings have been completed, *de novo* review is available to the contractor before the Tax Court (now the Court of Claims), which may review all issues of fact and law, including, of course, constitutional issues. Cf. *Aircraft, supra*, 331 U.S. at 769, n. 30, citing 89 Cong. Rec. 9930. The Court concluded, therefore, that "Congress clearly and at the very least intended the Tax Court's functions * * * to be fully performed, before judicial intervention should take place * * *." *Aircraft, supra*, 331 U.S. at 771.

Congress did not intend, and these decisions do not suggest, that the exhaustion requirement turns upon the nature of the challenge to the administrative procedures." Nor are these decisions limited, as the

* In *Aircraft*, the contractor argued that the exhaustion requirement set forth in *Macauley* was inapplicable because that case "raised only questions of coverage, not issues of

court of appeals concluded, to questions concerning the extent of contractors' liability or susceptibility to renegotiation (Pet. App. A, p. 29a). In *Lichter*, for example, the Court rejected an attack upon the constitutionality of the absence of an administrative hearing before the Board (334 U.S. at 791-792)."

The court below has adopted arguments substantially identical to those rejected in *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*. "Apart from allegations going to constitutionality and coverage," Aircraft "asserted defects in the renegotiation procedures followed," because the Board's action "was based in part at least on information said to have been obtained from 'governmental and other reliable sources' which the appellant has had no opportunity

constitutionality. Here both types of questions are presented." 331 U.S. at 767. The Court concluded that "we do not think the effect of that ruling is exhausted simply because constitutional questions were not raised there, but have been put forward in this case." *Id.* at 771.

" In *Lichter*, the contractor did not petition the Tax Court for redetermination of the Renegotiation Board's assessment of the excess profits due. This Court rejected the contractor's claim that the Act was unconstitutional on its face, and concluded that the Board's decision had become final by virtue of the contractor's failure to resort to the Tax Court. Thus, although *Lichter* involved a judicial review of the agency procedures when there had been no Tax Court decision, the renegotiation procedure had been completed by the contractor's failure to pursue the further remedy originally available. It was, therefore, not a situation in which an ongoing renegotiation proceeding was interrupted to permit judicial review.

to examine or rebut." 331 U.S. at 758-759, n.12.²⁰ Despite these asserted defects in board procedures, which were similar to those urged here,²¹ the Court refused to permit renegotiation proceedings to be enjoined prior to completion of the administrative proc-

²⁰ The contractor alleged that the Board's procedures denied it due process because "plaintiff was afforded no opportunity to examine or rebut any of the said extraneous data so obtained and considered by the defendants," nor was it "afforded any opportunity to present any arguments or contentions based upon such financial, operating or other data obtained," and "accordingly it could not know all the matters and things about which it might present arguments and contentions." No. 95, O.T. 1946, Transcript of Record, Vol. I, pp. 136, 141. The contractor further alleged that the statement of facts and reasons for the Board's decision, to which it was entitled under the Renegotiation Act, must be produced prior to the renegotiation because otherwise "such statement is of no benefit to the plaintiff." *Id.* at 142.

²¹ Both Astro Communication and Bannercraft alleged that the Board "relied materially upon documents in its possession * * * which were not made available to Plaintiff * * *. Plaintiff has been unable to respond to the information contained therein * * * and Plaintiff has therefore been * * * unable reasonably to avail itself of the administrative proceeding" (App. 19, 38). Both further alleged that "[c]ontinuation of renegotiation proceedings without the availability to Plaintiff of the documents * * * would cause Plaintiff to be unable adequately, reasonably or fairly to present its position in such renegotiation proceedings, and would * * * deny Plaintiff due process of law" (App. 16, 40).

Lilly alleged that "the Plaintiff corporations do not know what information the Board obtained from other sources * * * or the significance or qualitative or quantitative value given to such information. Consequently * * * Plaintiff corporations are unable to determine whether the Board has information which should be corrected or supplemented, what arguments to make, what facts to explore and develop" (App. 85).

ess. Is concluded that "[t]o countenance short-circuiting of the Tax Court proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm." 331 U.S. at 781.

The court of appeals concluded that equitable intervention was necessary because it viewed the Renegotiation Act as indicating that "the administrative process cannot function as it was intended to function until [the contractors] are given access to the documents" (Pet. App. A, p. 20a), and therefore that such access must be provided at an early stage in the proceedings. But as this Court has pointed out, the entire legislative scheme is intended "to relieve the interrelated processes from the tedious burden of litigation" and expedite the informal renegotiation proceedings.²² Injecting the courts into this process to referee disputes over particular documents would frustrate rather than further the Renegotiation Act's basic policy.

The Act and the Board's regulations contemplate a negotiation process in which limited disclosures of the bases upon which Board actions are taken are made at specified stages of the renegotiation proceeding. As the dissent below shows, intervention by the district court to halt renegotiation proceedings until documents are made available upsets this carefully considered regulatory scheme:

²² *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*, 331 U.S. at 777.

[T]he majority seems to ignore one of the critical aspects of negotiation that sets it apart from litigation as a device for resolving disputes: the skillful negotiator carefully guards and controls his adversary's access to the critical bits of information that would reveal the strengths or weaknesses of his bargaining position.

The regulations describing the Board's proceedings reflect this characteristic approach to the release of information in negotiation. Indeed, the "seemingly endless *de novo* reviews" that the majority consider are intended to coerce settlement at lower levels of the administrative machinery by making appeals more risky, instead reflect the recognition that neither party to the renegotiation is to be bound by *or limited* to the information he revealed at the previous step. The *de novo* reviews permit the continuous introduction of new information and shifting bargaining positions as the contractors and the Government negotiate their way toward a final settlement. In the context of this negotiation procedure, the regulations are quite explicit concerning the timing and content of the Government's release of statements regarding the facts and rationale on which they have relied at each stage of the administrative process. 32 C.F.R. §§ 1472.3(f), 1477.2, 1477.3. * * *

[B]y interrupting the administrative proceedings while Information Act claims are being resolved in collateral judicial proceedings [the majority] have totally destroyed the balance of negotiating strength that Congress intended to exist under the Renegotiation Act.

In brief, the irreparable injury urged by these appellees as the source of their right to injunc-

tive relief is a temporary condition that was carefully and intentionally imbedded in the structure of the renegotiation procedures—the timing of the Government's release of information concerning their bargaining position. * * * [Pet. App. A, pp. 41a-42a.]

The Freedom of Information Act does not change the clear design of the Renegotiation Act to assure that renegotiation proceeds expeditiously without interruptions for judicial review. The Freedom of Information Act, as we have shown above, was intended to assure that agencies not “deny legitimate information to the public” (S. Rep. No. 813, at 3); there is no indication therein of any intention to amend the Renegotiation Act, as interpreted by this Court, to permit judicial injunctions against ongoing renegotiation proceedings. Indeed, Congress has subsequently reviewed the renegotiation procedures and altered them only to the extent of substituting the Court of Claims for the Tax Court as the forum for *de novo* judicial consideration. Congress did not thereby intend to make any other significant change in renegotiation proceedings. See S. Rep. No. 245, 92d Cong., 1st Sess.

In its discussion of the traditional equitable factors governing injunctive relief (Pet. App. A, pp. 19a-30a), the court of appeals indicated that the administrative proceedings do not provide an adequate remedy, and that there is “no legitimate judicial policy” served by requiring exhaustion of renegotiation proceedings, because the contractors have exhausted whatever remedies exist administratively under the

Freedom of Information Act (Pet. App. A, p. 25a, n. 11). But exhausting the remedies under the Information Act entitles respondents to prompt judicial consideration of their Information Act claims; it does not authorize enjoining the Board's renegotiation proceedings. The remedy which must be exhausted before renegotiation proceedings can be reviewed is the administrative remedy provided by the Renegotiation Act.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, Petitioner

v.

BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY, a division of
AIKEN INDUSTRIES, INC.;
DAVID B. LILLY Co., INC.

**On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit**

BRIEF FOR RESPONDENTS
BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, *Petitioner*

v.

BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY, a division of
AIKEN INDUSTRIES, INC.;
DAVID B. LILLY Co., INC.

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS
BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.

QUESTIONS PRESENTED

1. Whether a temporary stay of proceedings before the Renegotiation Board was within the jurisdiction of the district court where the litigants had shown a strong likelihood of success of securing a decree direct-

ing the Board to make specific relevant documents available for inspection under the Freedom of Information Act.

2. Whether, in the context of these cases, entering a temporary stay of proceedings before the Renegotiation Board was an abuse of discretion where the litigants had shown a strong need for access to the relevant documents to permit meaningful participation in the renegotiation process.

COUNTER STATEMENT OF THE CASE

Petitioner's statement of the case, while accurate, is only a summary of the Regulations of the Renegotiation Board as they appear in the Code of Federal Regulations 32 C.F.R. § 1421, *et seq.* (1972). The orders which are under review involve a considerable exercise of discretion by the trial judges. Thus, a more detailed factual statement is necessary for an evaluation of the issues in these cases.

I. Bannercraft Clothing Company, Inc.

Bannercraft Clothing Company, Inc. (hereinafter "Bannercraft") was engaged in the years 1966 and 1967 in the manufacture of military uniforms produced at a small plant in Philadelphia, Pennsylvania. Since Bannercraft's production during these years was almost entirely renegotiable pursuant to the Renegotiation Act, 50 U.S.C., App. § 1211, *et seq.* (1964), the company filed appropriate reports at the close of each fiscal year with the Renegotiation Board.¹ In late

¹ Contractors subject to the Renegotiation Act are required to file the "Standard Form of Contractors Report" on or before the last day of the fifth month following the close of the contractor's fiscal year. 50 U.S.C. App. § 1215(e)(1) (1964).

1969 and early 1970, representatives of the Eastern Regional Renegotiation Board (hereinafter "the Regional Board") conducted a review of Bannercraft's operations and had discussions with the president of the company. On February 20, 1970, the Regional Board, by letter, advised Bannercraft of its determination that the company had realized excessive profits in the amount of \$1,400,000 in Fiscal Year 1967 (App. 28).²

Bannercraft responded by letter of February 24, 1970 (App. 29), requesting that the Regional Board:

... furnish the contractor, pursuant to Section 1477.3³ of the regulations, a written summary of

² The following table is a summary of the Board's demands:

	1967	1966
1. Excess Profit Determination		
a. Regional Board:	\$1,400,000	\$ 75,000
b. Renegotiation Board:	1,450,000	75,000
2. Net Taxable Income as reported		
to Internal Revenue:	1,531,262	183,462
a. #1a. as % of #2:	91%	41%
b. #1b. as % of #2:	95%	41%
3. Net Profit for Renegotiation as adjusted and determined by		
The Renegotiation Board:	1,738,938	253,058
a. #1a. as % of #3:	81%	30%
b. #1b. as % of #3:	83%	30%

³ 32 C.F.R. § 1477.3 provides:

When a Regional Board has made . . . a final recommendation in a Class A case, . . . and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon

the facts and reasons upon which the determination was based. . . . Prior to reviewing the summary of facts and reasons, it is not possible to state whether all relevant evidence has been submitted since we have never had in writing the basis upon which you made this determination.

By letter dated March 2, 1970 (App. 30), the Regional Board responded to Bannercraft's request, stating in part:

Your letter requests a Summary of Facts and Reasons pursuant to the provisions of RBR 1477.3. However, you do not make the statement required by that regulation that the contractor has submitted all of the evidence which it believes to be relevant to the renegotiation proceedings. Accordingly, your request for a summary is defective.

This tortuous exchange precipitated further correspondence (App. 31), and finally the Regional Board supplied Bannercraft with the Summary of Facts and Reasons. Based in part on information which was referenced in or whose existence was suggested by that Summary, Bannercraft on March 16, 1970, submitted a written request to the Renegotiation Board for production of six categories of documents (App. 32-33), pursuant to the provisions of the Freedom of Information Act, 5 U.S.C. § 552 (1970) (hereinafter

which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement: *Provided*, that the contractor requests such a statement within a reasonable time after it has been advised of such final determination or recommendation, and states that it has submitted all the evidence which it believes to be relevant to the renegotiation proceedings. [Emphasis added]

"FOIA"). A panel of the Board held a meeting with representatives of Bannercraft on April 10, 1970. Bannercraft requested that the meeting be continued until after the Board had responded to its request of March 16, 1970.⁴ The Board rejected Bannercraft's request.

By letters dated April 29, 1970, the Board notified Bannercraft of its unilateral determination that it had realized excessive profits of \$75,000 in its Fiscal Year 1966 (App. 34) and \$1,450,000⁵ in its Fiscal Year 1967 (App. 35). Bannercraft was directed to reply by May 12, 1970, stating its acceptance or rejection of the Board's demand. Still bereft of any information relating to factual support for the Board's conclusions, and having received no response to its FOIA request, Bannercraft, on May 1, 1970, filed in the United States District Court for the District of Columbia a complaint pursuant to the FOIA seeking to temporarily restrain and enjoin the Board from withholding the requested documents and from proceeding with renegotiation with the company until the documents were produced (App. 24-27, 36-41). A pleading incorporating a motion to dismiss and opposition to the application for a temporary restraining order and preliminary

⁴ This request was based on the decision handed down in *Grumman Aircraft Eng'r Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970), filed March 10, 1970, by the United States Court of Appeals for the District of Columbia Circuit. The court ruled that the Board was subject to the provisions of the Freedom of Information Act and that certain Board documents were required to be disclosed under the Freedom of Information Act. See the same case on remand, 325 F. Supp. 1146 (D.D.C. 1971) *aff'd*, No. 71-1730 (D.C. Cir., July 3, 1973).

⁵ The Board provided no explanation whatsoever for the increase from \$1,400,000 to \$1,450,000 for Fiscal Year 1967.

injunction was filed on behalf of the Board on May 5, 1970 (App. 42). On May 6, 1970, the district court heard oral argument, considered the pleadings, and denied the motion to dismiss while granting a temporary restraining order (App. 44-45).

Thereafter, the Board filed an opposition to the motion for preliminary injunction and renewed its motion to dismiss supported by an affidavit of the Chairman of the Board, Lawrence E. Hartwig (App. 46-48). On May 15, 1970, after a full hearing in open court, the court entered a preliminary injunction, predicated on *Grumman Aircraft Eng'r Corp. v. Renegotiation Board*, 425 F. 2d 578 (D.C. Cir. 1970), and concluding, therefore, that further Board proceedings should be stayed pending the Board's compliance with the Act (Pet. App. B, pp. 45a-46a).

Bannercraft received the requested Statement of Facts and Reasons on May 21, 1970 for the Fiscal Years 1966 and 1967 and, on May 27, 1970 sent the Board an additional request under the FOIA to examine documents related to the factual basis for the Board's conclusions reflected in the Statement. The Board finally responded to Bannercraft's requests of both March 16, 1970 and May 27, 1970 by letter dated July 21, 1970⁶ (App. 52-59), and except for a few standard form negotiation agreements and clearance notices with all details blanked out,⁷ refused to produce any of the documents requested by Bannercraft.

⁶ The Act provides, at 5 U.S.C. § 552(a)(3), that such requests be acted on "promptly."

⁷ Sample forms of these documents appear at 32 C.F.R. § 1498.1 and § 1498.6.

On August 4, 1970, the Board filed a motion to dissolve the preliminary injunction supported by an affidavit and memorandum (App. 50-51), contending that their review and denial of respondent's requests, as detailed in the Board's letter of July 21, 1970 (App. 52-59), constituted full compliance with the FOIA. A hearing on this motion was held on August 13, 1970, and, after an examination by the court of the documents submitted by the Board, the court denied the motion to dissolve the preliminary injunction (App. 61).^{*} The Board then filed a Notice of Appeal.

II. Astro Communication Laboratory

Astro Communication Laboratory is a division of Aiken Industries (hereinafter "Astro"). The renegotiation proceedings involving Astro, insofar as they are applicable to this case, began on April 17, 1970, when Astro requested a renegotiation conference and a panel meeting (to be held after the renegotiation conference) with the Eastern Regional Board (App. 9). To assist in its efforts to make these conferences meaningful, Astro requested the Board to schedule both meetings at a time after the Board had responded to a request for the examination of documents made by Astro pursuant to the FOIA. On April 20, 1970, Astro submitted to the Board its written request pursuant to the FOIA for five categories of documents relating to its renegotiation proceeding (App. 6-8). The renegotiation conference was held on May 12, 1970, although the Board had not then responded to the Freedom of Information Act request. During the conference,

^{*} The preliminary injunction was entered by Judge John Lewis Smith, Jr., and the defendant's motion to dissolve the preliminary injunction was denied by Judge Edward M. Curran of the same court.

Astro was advised for the first time that the Regional Board had made a tentative determination of excessive profits in the amount of \$225,000 and further, that the meeting with the panel of the Eastern Regional Board had already been scheduled for June 12, 1970.* On June 10, 1970 there had been no reply to the FOIA request, nor had Astro been advised of the basis for the Board's tentative determination of excessive profits of \$225,000. Thus, Astro requested that the panel meeting with the Regional Board be postponed until the Board had responded to Astro's FOIA request (App. 10). The Board granted this request.

On July 21, 1970, the Board denied Astro's FOIA request in its entirety and refused to produce any of the requested documents. The Board cited exemptions (3), (4), (5), and (7) of the FOIA to justify its refusal to disclose the documents (App. 11-13). As with Bannercraft, many of the documents requested by Astro are now expressly made available to the public under the Renegotiation Board Regulations. *See* 32 C.F.R. §§ 1477.4, 1480.5 (1972).

* Under the regulatory provisions then in effect, 32 C.F.R. § 1472.3 (1961), this scheduling would have denied the contractor a meaningful opportunity to prepare for the panel meeting. Indeed, the panel meeting was not mandatory, but rather could be requested at the contractor's option in the event he decided not to enter into a renegotiation agreement based on the tentative determination rendered in the conference. 32 C.F.R. § 1472.3(f) (1961). The timing provisions of § 1472.3(h) clearly were designed to provide the contractor a reasonable time in which to make the threshold determination as to whether a panel meeting was desired in the first instance. The schedule sought to be imposed by the Board here would have required the contractor to short-circuit either the analysis necessary to deciding whether to request a panel meeting, or the preparation incident to the meeting itself.

On July 30, 1970, the Board approved the July 21, 1970 decision of its General Counsel and denied the request of Astro in its entirety (App. 14). The following day, July 31, 1970, Astro's counsel was informed by the Regional Board that the meeting with the Regional Board panel had been rescheduled for August 17, 1970. This date was later postponed to August 24, 1970 (App. 15).

On August 11, 1970, Astro filed a complaint with the district court pursuant to 5 U.S.C. § 552(a)(3), requesting the court to enjoin the Board from refusing to disclose documents requested by Astro and to enjoin further renegotiation until the Board complied with the FOIA (App. 2-5, 16-20). After oral argument on August 21, 1970, the district court (Pratt, J.) entered an order concluding that the Board had repeatedly denied requests for production of documents made by Astro and by others; that unless the Board was enjoined from continuing the renegotiation proceedings with respect to Astro's Fiscal Year 1967, the Board would proceed to a final determination prior to judicial review of Astro's right to the inspection of the documents.¹⁰

¹⁰ This conclusion was not mere speculation. The district court denied a similar injunction in *Grumman Aircraft Eng'r Corp. v. Renegotiation Board*, see note 4 *supra*, and the Board proceeded to a final determination without awaiting judicial review of its denial of Grumman's request for documents. At the time that Grumman's entitlement to the documents was determined, the Board no longer had jurisdiction since Grumman had filed its petition in the Tax Court. On July 27, 1971, the petition was subsequently transferred to the Court of Claims for a redetermination of the asserted excessive profits (Ct. Cl. Docket No. 569-71). The identical situation was repeated in *Holly Corp. v. Renegotiation Board*, Civil No. 1239-70 (D.D.C., May 12, 1970) (unreported), where Judge John Lewis Smith, Jr., who entered

The district court concluded, based upon the decision of the United States Court of Appeals for the District of Columbia Circuit in *Grumman Aircraft Eng'r Corp. v. Renegotiation Board*, *supra*, that Astro would likely succeed in the litigation and that it was appropriate to direct the Board to delay further steps in the renegotiation proceedings pending final determination of Astro's entitlement to inspect the documents.

The order directed the Board to allow Astro, within thirty days, to inspect and obtain copies of all documents requested by Astro which the Board, upon reconsideration, had no objection to producing, and to submit to the court, *in camera*, within thirty days from the date of the order, all documents which the Board objected to producing, with a statement of the reasons for each such objection (Pet. App. B, pp. 47a-49a).

At the eleventh hour, the Board asserted a claim of Executive Privilege for those documents which the court had ordered to be produced for *in camera* inspection. The court directed the Board to submit the documents to the court for *in camera* inspection in order to review the Board's claim of Executive Privilege but, on September 29, 1970, the Board filed notices

the preliminary injunction in *Bannerkraft*, decided that the facts of the *Holly* case did not warrant enjoining the renegotiation procedures, and Holly was forced to file a petition with the Court of Claims before determination of its entitlement to inspect the requested documents (Ct. Cl. Docket No. 843-71). The *Holly* case was subsequently settled and the petition dismissed. The Rules of the Court of Claims respecting renegotiation cases require that the petitioner post a bond in the amount of 100% of the Board's final net determination to prevent collection procedures by the United States pending redetermination on the merits by the Court of Claims (Ct. Cl. R. 26(b)).

of appeal with respect to that issue and the issue involved herein.¹¹ Thereafter, the United States Court of Appeals for the District of Columbia Circuit ordered the *Bannercraft* and *Astro* cases consolidated for hearing with that of *David B. Lilly Company, Inc.*, No. 71-1025. The cases were argued on March 9, 1972 and decided on July 6, 1972, where the court of appeals affirmed the actions of the district court in a 2 to 1 decision (Pet. App. A, pp. 1a-44a).

The majority opinion rationalized: that the emphasis of the Renegotiation Act is upon informal negotiation; that respondents could not participate in such meaningful negotiations without the documents requested under the Freedom of Information Act; that the district court had inherent equitable power to maintain the *status quo* by temporarily enjoining the Board proceedings; that the court was not being asked to rule on the merits of the case; and that since exclusive jurisdiction for judicial review of a dispute under the Freedom of Information Act lies in the district court, there was no administrative remedy to exhaust.

The dissent departed from the majority view primarily on the basis that the court lacked jurisdiction to enjoin the Board proceedings and that the renegotiation process was intended by Congress to be one in which the Board is not required to "reveal their hand." Thus, the Government should not have to disclose the requested documents except from time to time as it suited the Board's bargaining position.

¹¹ The appeal which involves the issue of the claim of Executive Privilege is not involved in this proceeding. See decision below, 466 F.2d at 348, n.2 (1972), and unpublished order of the court of appeals, dated July 6, 1972, denying the application for interlocutory appeal.

SUMMARY OF ARGUMENT

The Renegotiation Board is subject to the Freedom of Information Act. This Act unequivocally directs agencies to make available to any member of the public, those documents which are not specifically exempt under the nine categories of exemptions listed in the Act. Judicial review of an agency refusal to comply with the Act is within the exclusive jurisdiction of district courts, where the proceedings are *de novo* and the burden of establishing the exemption from the documents is on the agency.

District courts have inherent power to temporarily stay agency proceedings, particularly where there is no judicial review of the agency process. A contractor, upon completion of renegotiation proceedings, is entitled to *de novo* review of a determination of excessive profits in the United States Court of Claims. At each step of the proceedings before the Renegotiation Board, however, the contractor has an opportunity to attempt to negotiate and make settlement with the Board on the amount of excessive profits realized during the fiscal year.

The Renegotiation Act and the Board's Regulations require the Board to appraise the contractor's performance by comparison with contractors of a similar size and like nature. When the Board refuses to disclose the names of the contractors with whom the particular party is being compared and denies him access to any information bearing on his relative performance, the contractor is denied the opportunity of making an informed judgment as to the reasonableness of the Board's demands at each step of the renegotiation process. Since a member of the public is entitled to

the information sought by respondents in the district court, *Grumman Aircraft Eng'r Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970), *on remand*, 325 F. Supp. 1146 (D.D.C. 1971), *aff'd*, No. 71-1730 (D.C. Cir., July 3, 1973), the Board's wrongful and arbitrary refusal to make the documents available to companies involved in the renegotiation process justified temporary intervention in the form of equitable relief. Because such intervention would normally be of a very short duration, depending upon the Board's promptness in complying with the Freedom of Information Act, there is no basis for concluding that the district court abused its discretion here.

Furthermore, the Congress has required the United States Government and prospective contractors alike to make full disclosure of all facts at their disposal during the negotiation of a contract. Accordingly, no logic can justify different treatment of the contractor when the same contract, after performance, is subject to renegotiation.

ARGUMENT

I.

The District Courts Correctly Found That the Respondents Were Likely To Succeed in the Action Brought Under the Freedom of Information Act

The court of appeals correctly concluded that the FOIA applies to the Renegotiation Board and, relying upon *Grumman Aircraft Eng'r Corp. v. Renegotiation Board*, *supra*, found no basis for disturbing the findings of the district court. While the merits of the FOIA case were not before the court of appeals, the court expressly and necessarily concluded a likelihood of success warranting injunctive relief. Notwithstand-

ing that the *Grumman* decision was handed down on March 10, 1970 (several weeks before the first complaint was filed in the instant cases) and that the *Grumman* court unequivocally held the Renegotiation Board to be subject to the FOIA and the documents requested by Grumman to be subject to disclosure,¹² the Board nevertheless refused to abide by the *Grumman* decision. Moreover, as is reflected in the Board's rulings on the Bannercraft and Astro requests, the Board in refusing to follow *Grumman* employed a shotgun or blanket-type approach and invoked every conceivable exemption in the FOIA, including 5 U.S.C. § 552(b)(3), (4), (5), and (7) (App. 11-13; 52-59).

At the outset, it should be noted that the record of the Renegotiation Board under the FOIA has been, at the very minimum, one of extreme reluctance and perhaps more fairly, one of outright defiance. For example, in the *Astro* case below, the Board, after attempting to take advantage of a number of the Act's exemptions, responded to a court order for *in camera* inspection (Pet. App. B, p. 49a) with a belated claim of Executive Privilege. When the court responded with a further order directing *in camera* inspection for judicial review of the claim of Executive Privilege, the Board noted an appeal. That appeal is not before this Court.¹³

Upon remand to the district court in the *Grumman* case after the first court of appeals decision, the Board

¹² The categories of documents which the court found not to be exempt in *Grumman* are similar to those documents requested by respondents here.

¹³ See note 11, *supra*.

again sought refuge in a variety of exemptions in the FOIA, and, after these defenses were overruled by the court, "the Government moved for rehearing under Rule 59, Federal Rules of Civil Procedure, requesting the district court to consider a formal claim of Executive Privilege by the Chairman of the Renegotiation Board for the first time during the litigation." [*Grumman Aircraft Eng'r Corp. v. Renegotiation Board, supra*, Slip Op. at 22]. In affirming the district court's denial of the belated claim of Executive Privilege, the court concluded:

... It hardly follows that the Government should be allowed to play cat and mouse by withholding its most powerful cannon until after the district court has decided the case and then springing it on surprised opponents and the judge. In saying this, we do not mean to suggest that this particular cannon, in the context of this case, is any more than a pop gun. If the claim were indeed of such gravity as the Government now suggests, we can only wonder why the Government failed to alert the district court in a less extraordinary manner. [Slip Op. at 24]

Even where the Renegotiation Board has abandoned its stalling tactics and has made a gesture at compliance with the Act, it has done so only by releasing documents with such deletions that the material becomes virtually meaningless. Understandably, the courts have found such disclosure inadequate. *See, e.g., Fisher v. Renegotiation Board*, 473 F.2d 109 (D.C. Cir. 1972).

While the courts have not hesitated where appropriate to enjoin Renegotiation Board proceedings pend-

ing compliance by the Board with the FOIA,¹⁴ they have not blindly enjoined the Renegotiation Board proceeding merely on a showing that the Board was consistently refusing to comply with the FOIA. For example, in *Holly Corp. v. Renegotiation Board*, Civil No. 1239-70 (D.D.C., May 12, 1970) (unreported), Judge Smith, who entered the injunction in *Banner-craft*, refused to enter a preliminary injunction under similar circumstances, because the Board had not issued a final denial nor unreasonably delayed in processing Holly's request for disclosure under the FOIA.

In the instant proceedings, the Board's refusal to disclose requested information constitutes a final denial, and the district court here found that plaintiffs had demonstrated a likelihood of success in the FOIA litigation—a finding that has been fully vindicated by the subsequent decisions of the court of appeals in *Grumman, supra*, and *Fisher, supra*.

II.

The District Court Had Jurisdiction To Temporarily Stay the Renegotiation Proceedings

It is true that the Freedom of Information Act does not in express terms provide for enjoining on-going administrative proceedings. It is equally clear that nothing in the Act can be read to forbid the exercise of injunctive relief by a federal court.

¹⁴ See, e.g., *American Mfg. Company of Texas v. Renegotiation Board*, Civil No. 1246-71 (D.D.C. June 23, 1971) (unreported) (Gesell, J.), *aff'd per curiam*, No. 71-1760 (D.C. Cir., Oct. 19, 1972). The preliminary injunction was affirmed *per curiam* on October 19, 1972 (D.C. Cir., No. 71-1760) and is now held in abeyance by stipulation pending decision of this Court in the instant cases.

One thing is clear. Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war.

We conclude that Congress, by § 402(b) of the Communications Act of 1934, has not deprived the Court of Appeals of the power to stay—a power as old as the judicial system of the nation. [*Scripps-Howard Radio, Inc. v. FCC*, 316 U.S. 4, 17 (1942)].¹⁵

In the *Scripps-Howard* case, the Government contended that a specific grant of injunctive relief in a statute for one purpose implicitly limited the exercise of the general injunctive authority of the court to the express statutory authorization. This Court specifically disposed of this contention:

The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policies in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under § 402(b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary power to the federal courts. [316 U.S. at 11].¹⁶

The case most heavily relied upon by the petitioner here is *Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210 (6th Cir. 1970). There the court affirmed the principle that proceedings before the National Labor

¹⁵ See *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 291-2 (1960). See also *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), and *Hecht v. Bowles*, 321 U.S. 321, 329 (1944).

¹⁶ See *Murray v. Kunzig*, 462 F.2d 871 (D.C. Cir. 1972).

Relations Board would not be enjoined since there is an appropriate method of review of the proceeding in the courts of appeals pursuant to 29 U.S.C. § 160. Citing *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938), the Sixth Circuit further pointed out in the *Sears* case that the court's review of NLRB decisions includes procedural as well as substantive errors.

By contrast, there is no judicial review of proceedings of the Renegotiation Board. Rather, the proceeding is *de novo* in the United States Court of Claims. That distinction is critical here. Errors in Board proceedings which might permit a contractor to enter into a bilateral agreement disposing of this case are never subject to correction. The determination of excessive profits at each stage is subject to increase or decrease as it is in the Court of Claims. While a *de novo* proceeding has obvious merit in renegotiation cases, the inability of the Court of Claims to correct errors in the renegotiation process distinguishes this situation clearly from that pertaining to the NLRB and other agencies where there is direct appellate review of the entire proceeding.

III.

The Respondents' Demonstrated Need for the Documents Fully Supports Temporary Injunctive Relief

A. The Importance of the Requested Data to the Renegotiation Process

The Renegotiation Act contains a definition of excessive profits which is stated in very broad and general terms.¹⁷ Since the Board has never published regulations under item No. (6), the first five numbered

¹⁷ In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities,

items in this definitional section, known as the statutory factors, comprise the basic statutory guidelines for determining when profits are excessive. Since the Renegotiation Act directs that favorable recognition must be given to the efficiency of the contractor, with particular regard to quantity and quality production, reduction of costs, and economy in the use of materials, facilities and manpower, the determination of the amount, if any, of excessive profits must necessarily include an evaluation of the contractor's performance in comparison with the performance of other contractors producing the same or similar items. Indeed, the Board's Regulations specifically so provide:

Comparisons. In evaluating the contractor's performance, comparisons will be made with the prices, costs and profits of other contractors engaged in the production of the same or similar products or using the same or similar processes.
[32 C.F.R. § 1460.2(c)]

and manpower; and in addition, there shall be taken into consideration the following factors:

- (1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;
- (2) The net worth, with particular regard to the amount and source of public and private capital employed;
- (3) Extent of risk assumed, including the risk incident to reasonable pricing policies;
- (4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and co-operation with the Government and other contractors in supplying technical assistance;
- (5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;
- (6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted. 50 U.S.C. App. § 1213(e).

The contractor cannot, of course, make an informed judgment as to his relative efficiency, reasonableness of prices, costs or profits without an opportunity to examine the performance data of the companies with whom he is being compared. In Bannercraft's request under the FOIA, information was requested with respect to eleven companies which Bannercraft believed to be engaged in Government contracts for the sale of goods identical or similar to its own (App. 32-33). The Board's reply reflects that between the years 1962 and 1968, eight clearance notices and one renegotiation agreement were effected with the companies included in this list. A copy of these documents was provided Bannercraft but with all of the information deleted such that the material was worthless for comparative purposes (App. 52-59). These were the documents presented to the district court in connection with the Board's motion to dissolve the injunction (App. 50-51). After reviewing the documents, the court promptly denied the Board's motion (App. 61).

Although the Board has never further responded to this request of Bannercraft, the Board's Regulations since February 24, 1971 provide that the public shall have access to fifteen categories of documents, including agreements determining excessive profits, orders determining excessive profits, and statements of fact and reasons issued by the Board. *See* 32 C.F.R. § 1480.5 (1972). This Regulation concludes with the following:

Without regard to the provisions of 5 U.S.C. Section 552(a)(2), the Board will also make available for public inspection and copying summaries of facts and reasons issued by the Board.

Nevertheless, the Board continues to refuse to honor Bannercraft's and Astro's timely requests for this information concerning companies making the same or a

similar product. Rather the Board apparently continues to adhere to its initial response which is that:

The Board did not issue a final opinion (Statement of Facts and Reasons) to any of such manufacturers for any of the specified years. The Board did issue one Summary of Facts and Reasons to one contractor in such group. In my opinion, such Summary is exempt under 5 U.S.C. § 552(b)(3), (4), (5) and (7) and RBR § 1480.9 (a)(3), (4), (5) and (7). [App. 54]

A demand from the Board, as in the case of Banner-craft (*See* note 2, *supra*), that a contractor return either 95% or 83% of his total net profit for the year (percentage dependent upon whether one uses the net taxable income as reported to Internal Revenue or as adjusted by the Renegotiation Board) coupled with a refusal even to identify the contractors with whom he was compared, as well as a refusal to disclose the relative prices, costs and profits of those companies with whom the contractor was compared, justified the equitable intervention of the district court.

Bannercraft, for example, as a company consisted of the president and one secretary with the remainder of its personnel being production employees. The amount of front office overhead allowed to other contractors which would reduce their net profit would be an important factor in making the required comparison. A contractor who performs efficiently should not be penalized in renegotiation.¹⁸ As the Tax Court

¹⁸ Yet in the instant case, it is unclear whether inefficiency or efficiency is being penalized. In the renegotiation proceedings for fiscal 1967, the Board disallowed \$74,000 of Bannercraft's executive compensation expenses in computing renegotiable profits, recognizing as valid executive compensation expense only 62% of that allowed for tax purposes by IRS. Bannercraft's total executive compensation for 1967 amounted to only 5% of total sales in that year, a figure that may or may not compare very favorably with

so clearly pointed out in *Martin Mfg. Co. v. Renegotiation Board*, 44 T.C. 559, 566 (1965):

We do not think that it was the intention of Congress to have the profits on Government contracts renegotiated merely because a contractor, by carefully estimating costs and maintaining high standards of efficiency and thrift in its manufacturing process, is able to attain a favorable profit percentage ratio. To do so would penalize the contractor for the very practices which the Government sought to encourage.

Without the comparative data on companies similarly situated, Bannercraft cannot make an informed judgment as to whether its profits are in some amount excessive.

B. The Renegotiation Board's Duty To Disclose the Requested Information

The interrelationship of the Freedom of Information Act and existing regulatory authority is clear. The FOIA does not exempt but specifically includes all agencies of the Federal government. As President Johnson pointed out on signing Public Law 89-487 on July 4, 1966, the Act was truly a major historic event in the political history of this country.

I have always believed that freedom of information was so vital that only the national security, not the desires of public officials or private citizens, should determine when it must be restricted.

other Government contractors. Without disclosure of the comparative cost figures of other contractors against whom Bannercraft was measured, however, Bannercraft's opportunity to challenge Board determinations at the next level in the proceedings is rendered essentially meaningless—the Board has denied Bannercraft access to relevant information on which an informed decision could be predicated.

The FOIA like other statutes recently enacted by Congress,¹⁹ establishes an important policy for all agencies of Government. The statutory responsibilities of each agency must be re-evaluated in light of the purposes Congress sought to achieve through the FOIA.

The history of litigation under the FOIA indicates that some agencies initially demonstrated an uncertainty as to the scope and depth of congressional intent.²⁰ Each of the agencies subject to the Act has adopted regulations including appeal procedures within the agency as guides for requesting and securing access to documents within the control of the agency. See, e.g., 32 C.F.R. § 1480.

The Act makes information available to the public for public inspection and "it seems to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands." *EPA v. Mink*, 41 U.S.L.W. 4201, 4203 (U. S. Jan. 23, 1973). Certainly, one involved in an administrative-type proceeding²¹ has as broad a right to information within the possession of the agency as a member of the public. Where an agency denies access to documents any person may seek judicial review of the denial.

¹⁹ Cf. National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* (1970).

²⁰ See, e.g., *EPA v. Mink*, 41 U.S.L.W. 4201 (U.S. Jan. 23, 1973); *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971); *Soucie v. David*, 448 F.2d 1067 (D.C. Cir. 1971); *Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210 (6th Cir. 1970); *Grumman Aircraft Eng'g Corp. v. Renegotiation Board*, 425 F.2d 578 (D.C. Cir. 1970); *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969); *Wellford v. Hardin*, 315 F. Supp. 175 (D. Md. 1970), *aff'd*, 444 F.2d 21 (4th Cir. 1971).

²¹ The Renegotiation Board is not subject to the Administrative Procedure Act except 5 U.S.C. § 552. See 50 U.S.C. App. § 1221.

The question posed here, then, is whether a person who will be adversely affected by agency must sit idly by and suffer what may be an irreversible injury while the agency litigates the issue of access to documents through the federal court system. The statement of the question fairly suggests the answer. Injunctive relief is always discretionary. Such relief should not be set aside unless the reviewing court finds a clear abuse of such discretion.

Yet mere allegation that an agency has not complied with the FOIA does not imply that there should be an automatic stay of administrative agency proceedings under all circumstances, nor will injunctive relief be accorded a litigant where the agency procedures provide for discovery and where agency compliance with due process rights can be evaluated by the reviewing court.²² The renegotiation process, however, contains no provision for discovery and no provision requires the Board at any stage of the proceedings to reveal the comparative cost data underlying its determinations. Yet, at each stage of the proceedings, a contractor unwilling to make an uninformed judgment as to whether an excess profits determination is fair or reasonable and accede to the Board's demand risks an increase in the amount demanded. Conversely, the Renegotiation Board at all times has complete access to the contractor's financial records, as do the audit agencies in the various departments of Government and the General Accounting Office. The contractor, in effect displays the dummy hand during renegotiation while the Board plays its cards close to the vest.

If the position of the dissenting judge below had validity prior to the passage of the FOIA, it can retain

²² *Sears, Roebuck & Co. v. NLRB*, 433 F.2d 210 (6th Cir. 1970); but see *Bristol-Myers v. FTC*, 424 F.2d 935, 940 (D.C. Cir. 1970).

no vitality in light of the clear congressional mandate that the citizenry of this country be informed. The administrative process must function with due regard to the broad policies of statutes, such as the FOIA, that apply to all agencies. The dissent stresses a right of the Renegotiation Board to control a contractor's access to information, to permit the Board to strengthen its bargaining position or to avoid disclosing weaknesses in its position.

But while noting these facts, the majority seems to ignore one of the critical aspects of negotiation that sets it apart from litigation as a device for resolving disputes: the skillful negotiator carefully guards and controls his adversary's access to the critical bits of information that would reveal the strengths or weaknesses of his bargaining position. [466 F.2d at 366].

No authority is cited to support this proposition, and we submit this is not a supportable statement of federal policy.

In the Truth in Negotiations Act, 10 U.S.C. § 2304, *et seq.* (1970) (Pub. L. No. 87-653), Congress directed that both parties to the negotiation of a Government contract be fully informed. The Regulations implementing this statute provide in part:

If at any time prior to agreement on price the contracting officer learns through audit or otherwise that any cost or pricing data submitted is inaccurate, incomplete or noncurrent, he shall immediately call it to the attention of the contractor whether that defective data tends to increase or decrease the contract price. [32 C.F.R. § 3.807-5 (b)]

The Comptroller General has implemented this mutual full disclosure policy in at least two decisions:

... the Truth in Negotiations Act, requires that all significant cost or pricing data *available to one*

party to contract price negotiations be completely disclosed to the other party so that they may negotiate on equal terms and establish a price that will be fair and reasonable to both. [Comp. Gen. Dec. B-156313 (Aug. 31, 1967), unpublished; emphasis in original]

Subsequently, the Comptroller General ruled:

The legislative history of P.L. 87-653 discloses that one of its primary purposes was to require full, complete and accurate data and disclosure by both parties. [47 Comp. Gen. 336 (1967).]

The courts have also consistently held that superior undisclosed knowledge of a Government agency is a valid basis for affording one dealing with the Government relief in the form of money damages.²³ This well-established policy is not to be lightly turned aside in the context of renegotiation, particularly where in the formation of contracts subject to renegotiation full disclosure is required.

At each step of the renegotiation process a contractor has an opportunity to agree to a disposition of the claim, and this judgment cannot be fairly made without an evaluation of the factors that the Renegotiation Act specifies as the critical factors for determining the existence of and the amount of excessive profits. Given the historic equity powers of the federal courts to enter injunctive relief, a determination of whether the exercise of that discretion was abused in the context of these cases requires consideration of the importance of access to the documents by the

²³ *H. N. Bailey & Associates, Inc. v. United States*, 196 Ct. Cl. 166, 449 F.2d 376 (1971); *Helene Curtis Industries, Inc. v. United States*, 160 Ct. Cl. 437, 312 F.2d 774 (1963).

parties during the renegotiation process. Although "need" is not a prerequisite for production under the FOIA, need is certainly an important value in determining the propriety of staying temporarily the renegotiation process.

While *de novo* review is afforded in the Court of Claims,²⁴ a contractor cannot stay enforcement of the final order of the Board unless he has the resources to post a bond with the court in the amount equal to 100% of the Board's final determination.²⁵ A final order of the Board carries interest from 30 days after the date it is entered at an interest rate determined by the Board, and independent of the factor of time and expense consumed in Court of Claims litigation. Furthermore, under the Renegotiation Act the court is free to increase the final determination of the Board. 50 U.S.C. App. § 1218. An uninformed contractor certainly faces substantial risks in deciding to accept or reject a determination at each level of the Board's proceedings, including the final determination of the Board.

Because of the risks inherent in the contractor's exercise of judgment at each step of the process and his unassailable need to examine documentary evidence used by Board personnel at each step of the process, proceedings before the Renegotiation Board pose a peculiarly appropriate setting for the discretionary exercise of injunctive relief where the agency deter-

²⁴ Jurisdiction to undertake *de novo* review of Renegotiation Board proceedings was transferred from the United States Tax Court to the Court of Claims by Act of July 1, 1971, Pub. L. No. 92-41, §§ 2(b), 3(a), 85 Stat. 97, 98, amending 50 U.S.C.A. App. § 1218 (1970).

²⁵ Ct. Cl. R. 26(b).

minedly refuses to comply with an important legislative enactment such as the FOIA.

Thus the record here clearly demonstrates that respondents face irreparable injury and do not have an adequate remedy at law. Where the remedies for agency non-compliance with the FOIA have been specifically provided by Congress, those remedies should not be permitted to become a nullity as a result of the Board's stubborn refusal to act in accordance with the unequivocal congressional mandate manifested in the Freedom of Information Act.

IV.

A Balancing of the Equities Clearly Justifies Injunctive Relief

As the court of appeals so clearly pointed out, injunctive relief in these circumstances should ordinarily encompass only a few days. The fact that the instant cases have consumed a substantial period of time simply reflects the fact that they are test cases which the Board has seen fit to litigate through this Court rather than to undertake prompt compliance with the FOIA.

The petitioner's reliance on *Lichter v. United States*, 334 U.S. 742 (1948); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); and *Macaulay v. Waterman Steamship Corp.*, 327 U.S. 540 (1946) is misplaced in the context of the instant cases. If anything, these cases support the jurisdiction of a court to grant relief, since in each opinion the Court did not deny the jurisdiction of the district court to enjoin renegotiation proceedings in appropriate cases. Rather, in each of these cases, this Court found only an absence of jurisdiction in the district court to

consider the merits of matters over which Congress by statute had vested jurisdiction in the first instance in the Renegotiation Board, and thereafter in the United States Tax Court. Here, the district court is not being asked to make a determination on any issue which, pursuant to the Renegotiation Act, is within the jurisdiction or expertise of either the Renegotiation Board or the Court of Claims. Exclusive jurisdiction to determine FOIA controversies has been lodged with the district courts in the first instance. 5 U.S.C. § 552(a) (3). Furthermore, the Renegotiation Board possesses no expertise relating to the FOIA.

With respect to the question of exhaustion of remedies, which was the principal basis for the Court's disposition of *Macauley*, *Lichter*, and *Aircraft & Diesel Equipment Corp.*, *supra*, the court of appeals discussion in the decision below is both comprehensive and correct. The basic doctrine of exhaustion of administrative remedies is well ingrained in the field of administrative law but has no application here. The question unanswered by the above cases and remaining focal here is whether an administrative agency must be granted complete deference when that agency acts outside the scope of its congressionally assigned responsibilities and in fact exceeds the bounds of its proper jurisdiction.

CONCLUSION

For the foregoing reasons, respondents submit that the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SUPREME COURT, U. S.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

THE RENEGOTIATION BOARD, *Petitioner,*

v.

**BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC., *Respondents.***

*On Petition For A Writ of Certiorari To The
United States Court of Appeals For The
District Of Columbia Circuit*

**BRIEF FOR RESPONDENT
DAVID B. LILLY CO., INC.**

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(i)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-822

THE RENEGOTIATION BOARD, *Petitioner,*

v.

**BANNERCRAFT CLOTHING COMPANY, INC.;
ASTRO COMMUNICATION LABORATORY,
A DIVISION OF AIKEN INDUSTRIES, INC.;
DAVID B. LILLY CO., INC., *Respondents.***

***On Petition For A Writ of Certiorari To The
United States Court of Appeals For The
District Of Columbia Circuit***

**BRIEF FOR RESPONDENT
DAVID B. LILLY CO., INC.¹**

¹ Respondents Bannercraft Clothing Co., Inc. and Astro Communication Laboratory, a Division of Aiken Industries, Inc. are represented by separate counsel, who are filing a Brief on their behalf.

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-44a)² is reported at 466 F.2d 345. The Findings of Fact, Conclusions of Law and Order of the District Court in *David B. Lilly Co., Inc. v. The Renegotiation Board* (Pet. App. 50a-60a) are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1972. On October 4, 1972, the Chief Justice extended the time within which to file a Petition for a Writ of Certiorari to November 18, 1972. The Chief Justice, on November 8, 1972, granted a further extension of time to December 4, 1972, and the Petition was filed on that date. On January 22, 1973, this Court granted the Petition for a Writ of Certiorari. 410 U.S. 907. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

QUESTION PRESENTED

Where, during the course of renegotiation proceedings, the Renegotiation Board ("Board") refuses to produce certain documents requested by the contractor, and where the contractor files an action under the Freedom of Information Act to obtain those documents,³ does the

²References to the Appendix filed with the Petition for a Writ of Certiorari are cited "Pet. App." and references to the Appendix filed separately in connection with the Renegotiation Board's Brief on the merits are cited "App."

³The applicability of the Freedom of Information Act to the Renegotiation Board is not disputed. *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, 138 U.S. App. D.C. 147, 425 F.2d 578 (1970).

District Court have the power to preliminarily enjoin the Board from proceeding further, until the Court can, on an expedited bases, rule on the contractor's entitlement to such documents for its use in the renegotiation proceedings?

STATUTES INVOLVED

The relevant sections of the Freedom of Information Act, 5 U.S.C. §552, *et seq.*, and of the Renegotiation Act, 50 U.S.C. App. §1211 *et seq.*, are set forth at Pet. App. 61a-67a.

STATEMENT

This action was filed on July 9, 1970 in the United States District Court for the District of Columbia by Respondent David B. Lilly Company, Inc. ("Lilly") for itself and as successor in interest to Delaware Fastener Corp. ("Delfasco"). During 1967 Lilly and Delfasco were Delaware corporations which, because of their performance under certain subcontracts relating to government procurement, were subject to the Renegotiation Act [50 U.S.C. App. §1211 *et seq.*]. Delfasco was merged into Lilly in January, 1970 after renegotiation proceedings as to each corporation for 1967 had begun, but before this action was filed. (App. 67, 75.)

As more fully set forth herein, Lilly filed this action against the Renegotiation Board ("Board") on July 9, 1970, seeking an injunction ordering disclosure of documents under the Freedom of Information Act [5 U.S.C. §552 *et seq.*] and an injunction against further renegotiation proceedings until its request for documents was resolved by the Court. This action was filed and pursued only after and in the context of the following chronology of events.

1. For two years, i.e., from early 1968 (when renegotiation reports were filed by Lilly and Delfasco reporting income for 1967 subject to renegotiation) until June 4, 1970, Lilly and Delfasco had supplied information to the Board concerning their activities relevant to renegotiation and had received no notice as to what, if any, conclusions the Board had reached. (App. 67, 75.)

2. As of June 4, 1970, the Board's renegotiator, the initial staff member assigned to pursue renegotiation, had determined that Lilly and Delfasco had received excessive profits totaling \$700,000 for 1967, which determination had been reached by him without the knowledge of, or notice to, Lilly and Delfasco. (App. 67-68, 75-76.)

3. As of June 4, 1970, the renegotiator's determination had been approved by a division of the Eastern Regional Renegotiation Board ("Eastern Board"); again without notice to, knowledge of or consultation with Lilly or Delfasco. (App. 67-69, 72, 75-76.)

4. At a meeting on June 4, 1970, Lilly was told by the renegotiator of what was, in effect, a *fait accompli*, namely that he, with approval of the Eastern Board, had made a \$700,000 excessive profit determination and that Lilly could agree to the determination or appeal it to the Eastern Board which, as the renegotiator made clear, had already considered the case and approved the determination, all *in camera* as far as Lilly and Delfasco were concerned. (App. 67-68, 72, 75-76.) Lilly was also given the option to bypass the Eastern Board completely and appeal directly to the Board, thereby forfeiting the intermediate appeal stage. (App. 76.)

5. Lilly was given until July 10, 1970 to decide which course of action it would elect. It was told, on June 4, 1970, that if by July 10, 1970 it elected a hearing before the Eastern Board, such hearing would be held

within ten days of that election, but that if such a hearing were not elected by that date, the right to such a hearing would be lost. (App. 68, 71, 72, 76.) At that time, Lilly asked for, but was not told, the factual basis for the \$700,000 determination of which it had just been advised. (App. 76-77.)

6. Since Lilly faced the risk that the \$700,000 determination could be increased at either the Eastern Board or the Board levels (App. 77), it was necessary to learn the basis for the said determination in order first to decide whether to take the risk of going further and, if it so chose, then second to attempt to prepare an effective presentation which would meet, head on, whatever basis had been used by the Eastern Board in reaching its initial determination. Not having been given such information, Lilly, on June 29, 1970, formally requested a number of documents from the Board and further requested a speedy resolution as to documents in view of the then pending July 10, 1970 deadline for electing a course of action (App. 68, 72-74, 76-77.)

7. By July 9, 1970, one day before the deadline for electing how to proceed, the Board had neither acknowledged receipt of, nor otherwise responded to, the said June 29, 1970 written request for documents, and it was obvious by that time that there was no possibility of having the information, or studying it even if it were afforded, by the end of July 10. (App. 69, 71.) Consequently, on July 9, 1970, the instant case was filed, asking not only for an order compelling production of the documents requested, but also for an order restraining the Board from acting and particularly from requiring Lilly to make an election on July 10, the then cut-off date. (App. 71.)

8. In the afternoon of July 9, after the suit had been filed and at a hearing on Lilly's application for a temporary restraining order, an Assistant United States Attorney, representing the Board, agreed to rescind the July 10 deadline while the Board considered Lilly's request for documents, and as a result, Lilly withdrew its application for a temporary restraining order. (App. 80, 84, 87-88.) It was not the Board but the Board's General Counsel who reviewed the June 29 request, and by letter of July 24, 1970, he notified Lilly of his decision to afford none of the documents, advising that Lilly had 20 days to appeal his decision to the full Board. (App. 84, 94-96.) The General Counsel's letter was received on July 27, 1970, and on July 30, 1970, while Lilly still had more than two weeks to appeal, the renegotiator presented Lilly with the following ultimatum: within 24 hours, namely by July 31, 1970, Lilly had to decide whether to accept the \$700,000 determination or appeal to the Eastern Board with a hearing on August 12, 1970, a date still within the 20-day appeal period which had been given Lilly as to the production of documents. (App. 84-85.) Lilly was advised that the Eastern Board's hearing would not be postponed, even though Lilly intended to appeal the General Counsel's decision within 20 days following July 24, and further that the August 12 hearing would go forward even if Lilly's appeal as to documents had not yet been resolved by the Board by that date. (App. 85.)

9. The ultimatum given to Lilly on July 30 was different from that existing on July 9 when suit was first filed. Initially, Lilly had been told that it had to elect a hearing by July 10 or forfeit a hearing. On July 30, Lilly was told that if it did not waive an Eastern Board hearing by July 31, such a hearing would be held on August 12

even if Lilly did not elect to have such a hearing. (App. 85.) In sum, on July 9, Lilly's failure to elect a hearing meant a forfeiture thereof; on July 31, Lilly's failure to elect or waive a hearing meant that an August 12 hearing would be held anyway.

10. On July 31, Lilly renewed its application for a temporary restraining order against further Board action, particularly aimed at restraining the Board from requiring Lilly to take any action (App. 81), namely from requiring Lilly to make an election by the close of July 31. When the Board refused to postpone either the July 31 deadline for such an election or the August 12 hearing date until the Board could review the appeal Lilly intended to file as to the decision on documents, the District Court, on July 31, entered a 10 day temporary restraining order prohibiting, *inter alia*, the Board from requiring Lilly to make an election and from prejudicing or curtailing Lilly's right either to request or decline an Eastern Board hearing (App. 90). The restraining order was thereafter extended for 10 days to August 20, 1970. (App. 92.) On August 6, 1970, Lilly appealed to the Board the General Counsel's decision denying all documents (App. 97-98), noting that Lilly's motion for a preliminary injunction was to be heard on August 20, 1970, and therefore requesting prompt attention in view of the August 20 date. (App. 98.) By letter of August 14, 1970, the Board denied Lilly's appeal, affirmed its General Counsel and refused to give any of the documents requested. (App. 99-101.) Thereafter, there was no further administrative remedy that Lilly could exhaust in attempting to obtain the subject information.

11. It was not until the morning of August 20, 1970, minutes before the preliminary injunction hearing, that the Board filed any response to Lilly's July 9 complaint,

affidavit, application for temporary restraining order and motion for preliminary injunction (App. 66-79) or to Lilly's July 31 affidavit, application for temporary restraining order and motion for preliminary injunction. (App. 81-88.) On August 20, the Board did not file an answer but, instead, filed a motion to dismiss or for summary judgment (App. 93). The papers so filed did not attack or deny the power of the court to issue an injunction.

12. As of August 20, 1970, more than two years had elapsed since commencement of renegotiation proceedings due to the Board's own timetable; and Lilly had voluntarily extended the limitations period. And, while the Board had waited 42 days to file any pleadings, it, at the same time, attempted to accelerate the administrative procedure by short and inflexible deadlines in terms of a day or days and by imposing inconsistent ultimatums without waiting first for the Board itself, and then for the Court, to resolve Lilly's Freedom of Information Act claims. Since Lilly had had only minutes to review the Board's motion papers, the court asked the Board's counsel if the Board would voluntarily refrain from further proceedings until Lilly could file a response and until the Court could resolve the case. When the Board refused, the Court entered a preliminary injunction to maintain the *status quo*. Before Lilly could file a response and before the District Court could rule on the question of documents, the Board appealed, and no further action has been taken by the District Court.

In its Brief (p. 23), the Board makes a point that Lilly is, in fact, benefiting by saving interest through the passage of time resulting from this litigation, and it couples this point with various references to the Board's regulations which, on their face, seem to afford a fair and

enlightened administrative procedure. (Renegotiation Board Brief, pp. 3-5.) Lest there be any inference that Lilly has deliberately eschewed an otherwise available, enlightened administrative procedure and has, instead, embarked upon groundless litigation for the purpose of delay and saving interest, we point out: first, this inference assumes that the Board is correct in its present \$700,000 determination, a premature assumption at best; second, the Board overlooks the fact that much of the delay to date has resulted from the Board's own appeal, during which it has sought and obtained repeated extensions of time for filing its brief, as well as for filing its Petition and Brief in this Court; and third, the Board overlooks the fact that this suit was filed and pursued in the District Court only as a last resort when all requests from Lilly and the Court for even a modicum of flexibility were refused. It was not merely the denial of Freedom of Information Act rights which Lilly claimed, but it was a combination of a deprivation of those rights together with a threatened procedure of being pressed ahead in the dark and under unrealistic deadlines and ultimatums, all at a time when, despite the desirability of expedition generally, time in terms of days was certainly not of the essence. Whatever might be the scheme of procedural regulations as described by the Board in the STATEMENT portion of its Brief (pp. 3-5), it was applied neither in letter nor spirit to Lilly. Not wanting to forfeit its procedural rights or options, Lilly tried by informal requests and ultimately by judicial intervention merely to preserve those options. Lilly exhausted all administrative remedies quickly, was willing to withdraw its request for a temporary restraining order as long as extrajudicial agreement was possible and then, thereafter, under pressure from the Board, pursued the suit early in

the administrative process so that, had no appeal been taken and had the District Court been allowed to rule as to the documents, it is likely that the final renegotiation result may not have been delayed at all.

ARGUMENT

I.

THE FREEDOM OF INFORMATION ACT IMPLIEDLY PERMITS A DISTRICT COURT, UNDER ITS GENERAL EQUITY POWERS, TO ISSUE A PRELIMINARY INJUNCTION TO MAINTAIN THE STATUS QUO OF A BOARD PROCEEDING WHILE A FREEDOM OF INFORMATION ACT CLAIM IS SUB JUDICE.

The District Court had jurisdiction under 5 U.S.C. §552(a)(3) to adjudicate Lilly's Freedom of Information Act ("Act") claim and to issue an injunction compelling the Board to disclose documents. Since Section 552(a)(3) permits such an injunction, the question here is whether the Act permits the Court, if traditional equity requirements are otherwise satisfied, to preliminarily enjoin further administrative proceedings while the main issue of disclosure is *sub judice*. Put another way, the initial question is, as the Board argues, whether, in a suit for a permanent injunction compelling disclosure under the Act, the Act precludes any form of judicial relief beyond that expressly provided therein.

The Report of the Committee on Government Operations of the House of Representatives, entitled Administration of the Freedom of Information Act, H.R. Rep. No. 92-1419, 92d Cong., 2d Sess. (Sept. 20, 1972) concluded:

The efficient operation of the Freedom of Information Act has been hindered by 5 years of foot-

dragging by the Federal bureaucracy. [H.R. Rep. No. 92-1419, *supra*, 8.]

* * * * *

Information sought by plaintiffs from Government is likely to be a perishable commodity, and in many cases these procedural delays by Government attorneys—whether or not made in good faith—may result in substantive damage to the plaintiff's case. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy. [H.R. Rep. No. 92-1419, *supra*, 74.]

Six years earlier, when originally adopting the Freedom of Information Act in 1966, Congress also noted and sought to reverse the then "long-standing" practice under which federal agencies, including the Board, generally withheld records or delayed disclosure.⁴ Since those seeking agency records might have only an illusory right to documents if disclosure were not ultimately made at a meaningful date, Congress sought to provide a remedy of "practical value"⁵ to those attempting to deal with the various federal agencies "effectively and knowledgeably".⁶ Hence, while Congress expressly provided for a remedy in the nature of an injunction compelling disclosure, it nowhere gave any hint, in either the statute or the legislative history, of a desire to abolish or preclude any other remedy necessary to assure that the ultimate disclosure had a "practical value" to those attempting to deal with an agency "effectively and knowledgeably."

⁴ H.R. Rep. No. 92-1419, 92d Cong., 2d Sess., 2 (1972); H.R. Rep. No. 1497, 89th Cong., 2d Sess., 5, 8 (1966); S. Rep. No. 813, 89th Cong., 1st Sess., 3, 5 (1965).

⁵ S. Rep. No. 1219, 88th Cong., 2d Sess., 7 (1964).

⁶ S. Rep. No. 813, *supra*, 7.

Evidently, the long-standing objectionable custom and policies which, prior to 1966, thwarted or made illusory and impractical the rights to information, have, despite the passage of the Act, continued for six years, at least according to the above noted September 20, 1972 House Report No. 92-1419. It appears from this legislative history that Congress has been concerned, in 1966 as well as in 1972, not only with a citizen's right to have information, but also with the citizen's obtaining the information before its usefulness perished. At times, only a stay of agency proceedings can assure that an ultimate disclosure order will not be rendered moot in terms of its usefulness to the applicant, and that was exactly the situation below.

Consistent with the legislative purpose to provide a mechanism for compelling disclosure quickly so as to make the disclosure practical and meaningful, Sec. 552(a)(3) requires that claims under the Act be given priority on a District Court's docket, obviously to assure that the value of the information will not be diluted by the passage of time. When, as in the case at bar, information is being withheld and when, because of deadlines and ultimatums being imposed in terms of days, not even the speediest judicial procedure under Section 552(a)(3) could hope to finally resolve the issue by a meaningful time, it is no more than a logical extension of Section 552(a)(3) to permit a preliminary injunction to prevent the kind of time related erosion of value which Section 552(a)(3) is geared to avoid.

While the Board, in its Brief, is correct that "need" by an applicant for information is not a prerequisite to his obtaining the information under the Act, it is not correct to state that "need" is irrelevant in terms of the effective judicial enforcement of the Act. Indeed, if an agency

knew it might be enjoined from further proceedings, it might be less inclined to engage in the kind of historical practices which Congress has deplored, and the existence of the power to enjoin proceedings would have the salutary effect of promoting further compliance with the Act. Since the power to stay proceedings not only assures that rights under the Act will be vindicated at a meaningful time, but also acts as an inducement to agencies to abandon their long-standing obstructionist policies, such power is in every way consistent with, and in furtherance of, the purposes of the Act.⁷

Moreover, courts sitting in equity, such as the District Court in connection with Lilly's claims under the Act, have traditionally enjoyed broad remedial powers to fashion relief not inconsistent with express statutory purposes,⁸ and, as this Court has observed, when Congress confers equitable jurisdiction, it does so in light of this traditionally broad residual equity power.⁹ In *Porter*

⁷See, H.R. Rep. No. 1497, *supra*, 9.

⁸*Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-292 (1960). The power of the Federal Courts to issue interlocutory injunctive relief has been described as derived from its "inherent equity power or the so-called All Writs statute [28 U.S.C. § 1651(a)]." Jaffe, *Judicial Control of Administrative Action*, 656 and n. 14 (1965). See also, *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4, 9-10 and n. 4 (1942); *Securities and Exchange Commission v. Barraco*, 438 F.2d 97 (10th Cir. 1971); *Naskiewicz v. Lawver*, 456 F.2d 1166 (2d Cir. 1972); *Los Angeles Trust Deed & Mortgage Exchange v. Securities and Exchange Commission*, 285 F.2d 162 (9th Cir. 1960).

⁹See, *Clark v. Smith*, 13 Pet.195, 203 (1839), cited with approval in *Mitchell v. Robert De Mario Jewelry, Inc.*, *supra*, at 292; and see generally, *United States v. DuPont & Co.*, 366 U.S. 316, 328, n. 9 (1961).

v. Warner Holding Co., 328 U.S. 395, 398 (1946),¹⁰ this Court stated:

[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.

Hence, even if the legislative history and apparent purpose of the Act did not themselves strongly imply the authorization for an injunction against further proceedings as in this case, the Act would still have to be construed against the background of the test quoted above. Such an exercise in statutory construction would inevitably lead to the same conclusion, namely that the District Court had the power to exercise the full scope of its traditional and broad equity powers in order to do full justice; and that the court did not contravene the word, spirit or objective of the Act in issuing a preliminary injunction aimed at preventing the usefulness of any remedy it might ultimately order from being diminished in value or rendered moot.

Whether we say, then, that the grant of equity power to enjoin proceedings is affirmatively a part of the Act or, instead, is a necessary consequence of the just mentioned principle of statutory construction, the conclusion is the same, namely that the majority below was correct in stating (Pet. App. 14a-15a):

[T]he usual presumption is that "if Congress had intended to make * * * a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co. v. Bowles*, *supra*, 321 U.S. at 329.

¹⁰See also, *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944).

and in concluding that (Pet. App. 16a):

[Congress has not] deliberately withheld the tools necessary for courts to implement its substantive decisions. Since temporary stays of pending administrative procedures may be necessary on occasion to enforce the policy of the Freedom of Information Act, we hold that the District Court has jurisdiction to issue such stays.

Though not directly on point, it is somewhat instructive that the 1965 S. Rep. 813 accompanying S. 1160¹¹ reflected a Congressional awareness that courts, sitting in equity on claims under the Act, had the power to grant relief beyond that expressed in the Act itself, in the nature of awarding costs to the complaining party "as in other cases." (S. Rep. 813, *supra*, at 8.) Nowhere does the statute itself provide for the payment of costs in the court's discretion "as in other cases." Here, perhaps, we have the most direct, though admittedly not determinative, expression that Congress was not, by the language of the Act, attempting to preclude all other remedies, available in other cases, merely because they were not expressly provided for in the language of the Act itself. Of perhaps more significance is the fact that we need not merely presume, by principles of statutory construction, a Congressional awareness of the availability of other judicial powers; instead, the awareness was express when

¹¹ S. 1160 was introduced in the 89th Congress and became the Freedom of Information Act, Pub. L. 89-487, 80 Stat. 250 (5 U.S.C. § 552), on July 4, 1966, effective July 4, 1967.

Congress enacted the Act.¹² Accord, Frankfurter, J., concurring in *Estep v. United States*, 327 U.S. 114, 140 (1946) [where habeas corpus, referred to in the legislative history of the Military Selective Service Act but ostensibly precluded as a remedy by that statute itself, was nevertheless implied as an available remedy under that statute].

There have been instances where even express prohibitions against judicial intervention in the framework of other statutes have not been read literally and where such intervention, by way of injunction against administrative proceedings, has been allowed. See, e.g., *Breen v. Selective Service Local Board No. 16*, 396 U.S. 460 (1970); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968); *Naskiewicz v. Lawver*, 456 F.2d 1166 (2nd Cir. 1972); *Aquavella v. Richardson*, 437 F.2d 397 (2nd Cir. 1971); *Coral Gables Convalescent Home v. Richardson*, 340 F. Supp. 646 (S.D. Fla. 1972); cf., *Enochs v. Williams Packing and Navigation Co., Inc.*, 370 U.S. 1 (1962).

¹² Because the Congress made no "unequivocal statement" and because the Act itself does not prescribe "exclusivity", the Renegotiation Board's reliance on *United States v. Babcock*, 250 U.S. 328 (1919), is misplaced. (Renegotiation Board Brief, p. 15). In *Babcock*, the Court of Claims attempted to review a decision of the Treasury Department where the statute expressly provided that the Treasury Department's decision "shall be held as finally determined, and shall never thereafter be reopened or considered." *United States v. Babcock*, *supra*, at 331. Nor is the decision below inconsistent with this Court's observation in *Environmental Protection Agency v. Mink*, No. 71-909, decided January 22, 1973, slip op. 13, n. 13, that "courts are not given the option to impose alternative sanctions—short of compelled disclosure . . ." The interlocutory injunctive relief here is *not an alternative* to disclosure. To the contrary, its purpose is to assure that the right to disclosure is not rendered meaningless or illusory.

In the instant case, there is no express statutory prohibition against a preliminary injunction such as here granted. To the contrary, while the Act is silent on the specific point, the scheme of the statute together with its history and purposes are consistent in indicating that such preliminary injunctive relief is implicitly very much a part of the Act. Certainly, such equitable relief is consistent with and in furtherance of the Act, and there appears to be no substantial reason for not permitting the exercise of powers traditionally inherent in a Court already vested with equity jurisdiction.

II.

LILLY EXHAUSTED ALL ADMINISTRATIVE REMEDIES NECESSARY AS A PREREQUISITE FOR SEEKING A PRELIMINARY INJUNCTION.

Lest there be any doubt that a court, even absent the express legislative grant of injunctive powers, may exercise its broad equity powers to enjoin administrative proceedings, the cases are many where courts have intervened when, during administrative proceedings, a person has been deprived of his rights under a federal statute,¹³ agency regulation¹⁴ or the Constitution.¹⁵ We do not understand the Board to dispute this but, instead,

¹³ *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Oestereich v. Selective Service System Local Board No. 11*, 393 U.S. 233 (1968); *Jewel Companies, Inc. v. Federal Trade Commission*, 432 F.2d 1155 (7th Cir. 1970).

¹⁴ *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U.S. 4 (1942); *Naskiewicz v. Lawver*, 456 F.2d 1166 (2nd Cir. 1972); *Murray v. Kunzig*, 462 F.2d 871 (1972), cert. granted 410 U.S. 981 (1973).

¹⁵ *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752, 773 and n. 38 (1947); *Damico v. California*, 389 U.S. 416 (1967).

the Board argues that such intervention was improper here because Lilly had not exhausted its administrative remedies before seeking judicial intervention. Correctly, the majority in the Court of Appeals concluded that because Lilly had exhausted its administrative remedies under the Act,¹⁶ that, because the issue presented cannot be raised at the conclusion of the renegotiation process¹⁷ and because a "clear threat to a statutory right" is at issue,¹⁸ the District Court did not abuse its discretion in interceding as it did.

To make an informed judgment whether to accede to the renegotiator's determination or whether to appeal to the Eastern Board, Lilly requested that it be permitted access under the Act to certain Board records relating to the renegotiation proceedings in which it was involved before the Board's delegate, the Eastern Board. The request was perfectly consistent with Lilly's rights under the Board regulations aimed at assuring "consultation"¹⁹ and "negotiation"²⁰ and with Lilly's right to be, at the initial level of the renegotiation process,

afforded an opportunity to be heard on the information and data previously submitted by [it] and on any other matters considered pertinent to the case.²¹

¹⁶ Pet. App. 25a.

¹⁷ Pet. App. 22a, 23a.

¹⁸ Pet. App. 21a.

¹⁹ Renegotiation Board Brief, p. 4.

²⁰ 50 U.S.C. App. §1215(a) (1973 pocket part); 32 C.F.R. 1472.3(b); 1472.3(i); 1472.4(d).

²¹ 32 C.F.R. §1472.3(f).

and with its right at the Regional and Statutory Board levels to

be afforded an opportunity to be heard on all matters considered pertinent to the case, including any unresolved issues or matters of fact, law or accounting.²²

Plainly, Lilly did everything it could to obtain the needed information before seeking judicial intervention.²³ Lilly was refused any disclosure both by the Board's General Counsel²⁴ and by the Board itself upon review of the General Counsel's action.²⁵ No further administrative avenues were open or available to Lilly to obtain the withheld information. There can be no valid contention that Lilly failed to exhaust the administrative procedure for obtaining information.

Nor can there be any valid contention that Lilly should have been forced to go through the entire renegotiation procedure before seeking judicial intervention. After such procedure, Lilly's only recourse would be a Court of Claims suit on the merits, not on the procedural irregularities, and, of course, at that time a District Court

²² 32 C.F.R. §1472.3(h); 32 C.F.R. §1472.4(c).

²³ The potential harm to Lilly through deprivation of its rights under the Act was being compounded by the Board's apparent violation of the spirit, if not the letter, of its own regulations. *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1954).

²⁴ 32 C.F.R. §1480.7(b), (d).

²⁵ 32 C.F.R. §1480.7(e).

action would have been moot.²⁶ As noted in *McKart v. United States*, 395 U.S. 185, 193, (1969) and as recognized by the Board,²⁷ the "application of the doctrine of exhaustion of remedies to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." Here, the particular administrative scheme of the Renegotiation Act is critical.

Under the Renegotiation Act, 50 U.S.C. App. §1211, *et seq.*, and the Renegotiation Board Regulations, 32 C.F.R. §1472.3(e), (i); 32 C.F.R. §1472.4(b), (d), each stage of the renegotiation proceeding, as well as litigation in the Court of Claims, 50 U.S.C. App. §1218 (1973 pocket part), is a *de novo* proceeding. Hence, there will never be a time when Lilly will have the right to demand that a prior stage of the proceeding be reviewed for irregularities—substantive or procedural. And, despite the Board's suggestion in its Brief²⁸ that the Court of Claims

²⁶ In this connection it is significant to recall that on July 30, 1970, three days after Lilly's receipt of a letter from the Board's General Counsel refusing any access to the requested information, the Eastern Board, despite the contractor's 20-day period to appeal the denial of documents, demanded that the contractor decide by the close of business on the next day (July 31, 1970) either to pay the \$700,000 or to appear before a panel of the Eastern Board on August 12, 1970. Lilly asked that a later date be selected in order to permit the Board to review the decision of its General Counsel. The Eastern Board refused, insisting on a hearing on that date, whether or not the request for documents was still unresolved. (App. 85.)

²⁷ Renegotiation Board Brief, p. 28.

²⁸ Renegotiation Board Brief, p. 29.

may "review all issues of fact and law", the Renegotiation Act expressly proscribes *any review*:

A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo. [50 U.S.C. App. §1218 (1973 pocket part).]

The Court of Claims cannot hear, leave alone decide, the question of whether Lilly had been denied procedural rights, and the Court of Claims has no authority to remand to cure such denial, no matter how egregious. Once a stage in the renegotiation process is passed, the contractor has no right to have a remand to cure even the most flagrant error. It is in this regard that renegotiation differs from other administrative proceedings where there is judicial review of both substantive and procedural matters, and where remand to correct irregularities is available.²⁹ In renegotiation, once procedural rights are lost at a stage in the proceedings, those rights are lost forever. As the majority in the Court of Appeals observed:

Because the statutory review procedures are all *de novo*, the review will be geared to a determination of whether in fact appellees realized excess profits. Clearly the reviewing bodies will not consider whether the contractors could have negotiated better settlements at a lower level if they had had access to the disputed documents. Nor will these

²⁹ See, e.g., *Skinner & Eddy Corp. v. United States*, 249 U.S. 557 (1919); *Leedom v. Kyne*, 358 U.S. 184 (1958); *Jewel Companies, Inc. v. Federal Trade Commission*, 432 F.2d 1155 (7th Cir. 1970).

bodies consider the possibility that if the documents had been made available appellees might not have appealed at all and thus not risked imposition of more extensive liability. [Pet. App. 22a.]

* * * *

The seemingly endless *de novo* reviews were intended to make the negotiating process work, not to provide a substitute for negotiation. If the negotiating process fails to occur, the opportunity is lost forever. To say that compulsory awards imposed by the Board or the Court of Claims at the end of the process provide an adequate remedy is to ignore the difference between an agreement freely arrived at, as preferred by Congress, and a judgment imposed by a court of law. [Pet. App. 23a.]

And, it was a recognition of the unique absence of review in renegotiation³⁰ that led the majority to find:

[I]t should be apparent here that if the contractors are to be granted relief at all they must have it now

³⁰ This lack of review in renegotiation distinguishes this case from the Sixth Circuit decision in *Sears, Roebuck and Co. v. National Labor Relations Board*, 433 F.2d 210 (1970). Under the National Labor Relations Act, as the Sixth Circuit noted, National Labor Relations Board decisions are reviewable in the United States Court of Appeals both as to substantive and procedural matters. 29 U.S.C. §160. On review, the court can cure an NLRB denial of procedural rights by remanding the matter for a further, or new, and proper hearing. Thus, if Sears' statutory rights were frustrated by the NLRB's refusal to comply with the Freedom of Information Act before concluding its proceedings, the administrative proceedings could be reopened after Sears had secured a remand and a proper administrative hearing afforded. See, in this connection, *Sears, Roebuck & Co. v. National Labor Relations Board*, 473 F.2d 91 (D.C. Cir. 1972), *petition for certiorari pending*, No. 72-1503.

before that administrative momentum carries their cases beyond the point where the harm can be undone. [Pet. App. 23a.]

The Board's response to the opinion below appears to be that, even though the exhaustion doctrine is to a degree a flexible or discretionary one, nevertheless renegotiation proceedings can never be subject to judicial intervention. In so arguing, the Board relies upon *Lichter v. United States*, 334 U.S. 742 (1948); *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U.S. 752 (1947); and *Macauley v. Waterman Steamship Corp.*, 327 U.S. 540 (1946). To be sure, in the circumstances presented in each of the cases, this Court disapproved judicial intervention as premature. The cases do not, however, support the blanket rule claimed by the Board, nor do they support a conclusion that the District Court here overstepped its bounds.

In *Macauley v. Waterman Steamship Corp.*, *supra*, the question presented was whether or not the Maritime Administration had authority to renegotiate contracts made between Waterman and the British Ministry of War Transport. The resolution of this question hinged on a resolution of factual issues intertwined with an interpretation of the coverage of the Renegotiation Act. This Court rejected Waterman's attempt to litigate this question of coverage because the Act expressly committed the initial determination of such questions to the administrative body.

In *Lichter v. United States*, *supra*, this Court did in fact consider Lichter's attack on the constitutionality of the Renegotiation Act on its face (334 U.S. 791-792),

and after upholding the constitutionality, ruled (*id.*, 792-793):

[W]e hold that the respective petitioners do not have the right to present questions as to the coverage of that Act, as to the amount of excessive profits adjudged to be due from them or as to other comparable issues which might have been presented by them to the Tax Court upon a timely petition to that court for a redetermination of excessive profits, if any.

In the instant case, Lilly did not ask the District Court to resolve any issue that should otherwise have been, under *Lichter*, properly submitted first to the Board or the Court of Claims.

Moreover, in upholding the constitutionality of the statute in *Lichter*, this Court relied upon its prior decision in *Opp Cotton Mills v. Administrator of Wage and Hour Division*, 312 U.S. 126, 152, 153 (1941), stating:

"The demands of due process do not require a hearing, at the initial stage or at any particular point or at more than one point in an administrative proceeding so long as the requisite hearing is held before the final order becomes effective." [*Lichter v. United States*, *supra*, 334 U.S. at 791-792.]

At the time that this Court wrote its decision in *Lichter*, renegotiation involved a two-stage proceeding—the first, before the Renegotiation Board, and the second, before the Tax Court of the United States, an independent agency in the Executive Branch. Since 1971, the second stage is before the Court of Claims, a court established under Article III of the Constitution of the United

States.³¹ As a result of this change, there is no longer a two-stage administrative proceeding. Instead, there is an administrative proceeding before the Renegotiation Board, which can be followed by a proceeding before the Court of Claims. Thus, if a contractor is to have a due process hearing at the administrative level, the hearing must be held before the Renegotiation Board proceedings are concluded.

In *Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*, the contractor sought to litigate in the court issues then pending and undetermined in the Tax Court. This Court, quoting from its opinion in *Macauley*, *supra*, decided:

"Congress intended the Tax Court to have exclusive jurisdiction to decide questions of fact and law, which latter include the issue raised here of whether the contracts in question are subject to the Act."
[*Aircraft & Diesel Equipment Corp. v. Hirsch*, *supra*, 331 U.S. at 766.]

As regards the voluminous constitutional challenges made in *Aircraft & Diesel*, this Court declined decision. Instead, this Court simply observed that the contractor had "an adequate remedy at law" to raise such issues in the Tax Court, where the matter was pending, or in a collateral proceeding.³² Moreover, this Court did not, as the Board

³¹ Pub. L. 92-41, 85 Stat. 97, amended the Renegotiation Act to substitute the Court of Claims for the Tax Court. The Court of Claims is established pursuant to 28 U.S.C. §171.

³² The collateral proceeding suggested consisted of suits in the District Court by Aircraft & Diesel against its customers. This Court reasoned that if the administrative agency, as had been threatened, took steps to have Aircraft & Diesel's customers pay to the government the money owed to Aircraft & Diesel, the contractor would have a right of action against its customers. Because, under the Act, the government was required to indemnify the customers, Aircraft & Diesel's suits against the customers would, in effect, be suits against the government.

contends, rule out a District Court's intervention in an appropriate case. As Professor Jaffe notes in his treatise, *Judicial Control of Administrative Action*, 669 (1965):

Aircraft [& Diesel Equipment Corp. v. Hirsch, supra,] did not intimate that there was no judicial power to preserve the status quo by staying the administrative action until the prescribed administrative review was completed. As a matter of fact, it seemed at one place to say just the opposite; to Aircraft's contention that the suit it had brought in the district court was its only real remedy, the Court replied that this was not so, that Aircraft had the right to sue its customers for the money being withheld pursuant to the directives of the Under Secretary of War. Indeed, in a footnote to its opinion, the Court said:

* * * * *

"It is unnecessary to consider whether in such a suit a district court should find it proper to defer its final decision until after the Tax Court had made its final redetermination. . . . For, even in the event of such action, *the court would have power to preserve, pending the administrative decision, the status quo and all rights of the appellant.*" [Emphasis added by Professor Jaffe.]

Here, unlike in the cited cases, there is no attempt to wrest from the Board or the Court of Claims matters committed to them for decision. The decision of the District Court merely preserved the *status quo*—it has no substantive effect on the amount, if any, of Lilly's renegotiation liability.

The enlightened consultation and negotiation, called for by the Board's own regulations, would seem to

incorporate, at least in spirit, the disclosures required by the Act so that the two, hand-in-hand, will act to give a contractor the fairest opportunity successfully to confront the Board and its *in camera* determinations. While not an issue before this Court, there appears, as the District Court recognized, a substantial likelihood of success by Lilly in obtaining the documents requested.³³ Under all the circumstances, it would have been an extremely harsh result had the District Court not intervened in the face of a threat by the Board to run roughshod over Lilly's rights under both the Act and the Board's regulations when there was not a countervailing need on the part of the Board.

CONCLUSION

The decision of the Court below should be affirmed.

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July 18, 1973

³³ See, *Grumman Aircraft Engineering Corp. v. The Renegotiation Board*, ___ F.2d ___ (D.C. Cir., Docket No. 71-1730, decided July 3, 1973).

IN THE
Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,

Petitioner,

vs.

**BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO
COMMUNICATION LABORATORY, A DIVISION OF
AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO.,
INC.,**
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICUS CURIAE OF THE CHAMBER OF
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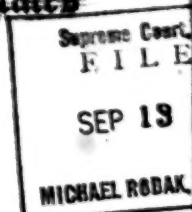


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IN THE
Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,

Petitioner,

vs.

**BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO
COMMUNICATION LABORATORY, A DIVISION OF
AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO.,
INC.,** *Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF AMICUS CURIAE OF THE CHAMBER OF
COMMERCE OF THE UNITED STATES OF
AMERICA.**

INTEREST OF THE AMICUS CURIAE.*

This brief is filed on behalf of the Chamber of Commerce of the United States of America, a federation consisting of a membership of over thirty-seven hundred (3700) state and local chambers of commerce and professional and trade associations, a direct business membership in excess of thirty-eight thousand (38,000), and an underlying membership of approximately five million (5,000,000) business firms and individuals. It is the largest association of business and professional organizations in the United States.

* This Brief is lodged with the express written consent of all parties pursuant to the rules of this Court.

In order to represent its members' views on questions of importance to their vital interests and to render such assistance as it can to courts' deliberations in such areas, the Chamber has frequently participated as *amicus curiae* in a wide range of significant labor relations matters before this Court. *E.g.*, *N. L. R. B. v. The Boeing Company, et al.*, 93 S. Ct. 1961 (1973); *N. L. R. B. v. International Van Lines*, 93 S. Ct. 74 (1972); *N. L. R. B. v. Granite State Joint Board*, 409 U. S. 213, 34 L. Ed. 2d 422 (1972); *N. L. R. B. v. Pittsburgh Plate Glass Co.*, 404 U. S. 157 (1971); *Boy's Markets v. Retail Clerks Union*, 398 U. S. 235 (1970); *N. L. R. B. v. Burns International Security Services, Inc.*, 406 U. S. 272, 80 LRRM 2225 (1972); *H. K. Porter Co. v. N. L. R. B.*, 397 U. S. 99 (1970); *Sears Roebuck and Co. v. Carpet Layers, Local 419*, 397 U. S. 655 (1970); and *Los Angeles Herald Examiner v. Kennedy*, 400 U. S. 3 (1970).

The instant proceeding is of particular concern to the Chamber's members, as well as to employers generally. In issue are the following important questions:

First, whether a district court has the power or jurisdiction to enjoin on-going agency proceedings until the court is able to review the agency's actions;

Second, whether a district court properly exercises its discretion when it enjoins on-going agency proceedings until the court determines whether parties before the agency are entitled to the documents sought under the Freedom of Information Act which the agency has refused to disclose.

As a corollary to the second issue is the related question of whether an agency's refusal to disclose requested information should be *presumed* to constitute the requisite irreparable harm warranting an injunction of administrative proceedings pending the agency's compliance with its statutory duties of disclosure or a judicial determination that the requested documents should be furnished.

These issues are of practical significance to the Chamber and its members in that such members, both as charged and charging parties, appearing frequently before governmental agencies, have been denied access to certain information subject to disclosure under the Freedom of Information Act and are in continuing jeopardy of future non-disclosure. The tendency of agencies to withhold information causes real injury to private parties whose interests are being adjudicated in an agency proceeding because these parties are unable, without this information, to deal effectively and intelligently with the agency during the proceeding. Because the information is useful only if promptly disclosed during the agency proceeding, it is of great importance to the Chamber and its members that the agency proceeding be enjoined until the agency complies with its statutory duties of disclosure. Moreover, absent immediate injunctive relief by the district court, these agencies would be able to accomplish by delay what they may not lawfully do directly; that is, by engaging in foot-dragging, an agency can postpone disclosure of information which is subject to the Information Act until its usefulness in the underlying agency proceeding has long since expired.

STATEMENT.

In these cases, the Respondents here during litigation before an agency requested the agency to disclose certain information pursuant to the requirements of the Freedom of Information Act, 5 U. S. C. Section 55 *et seq.* (1970) (hereinafter "FOIA"). The agency refused this request claiming that the Act's exemptions applied to the information requested. The Respondents then sought a temporary injunction from a district court in order to stay the on-going agency proceedings and to preserve the *status quo* until the court decided the merits of the FOIA claim. The District Court enjoined further agency proceedings and the Court of Appeals affirmed.

This brief will discuss the following general areas:

First, whether a district court has the power or jurisdiction to enjoin on-going agency proceedings until the court is able to review the agency's actions.

Second, whether a district court properly exercises its discretion when it enjoins on-going agency proceedings until the court determines whether parties before the agency are entitled to the documents sought under the FOIA which the agency has refused to disclose.

While the *amicus* urges affirmance of the case below, the arguments here presented can apply with equal vitality when litigants involved in proceedings before other agencies request documents pursuant to the FOIA and then seek to enforce their claims in district court.

SUMMARY OF ARGUMENT.

A district court has jurisdiction to temporarily enjoin on-going agency proceedings in order to preserve the *status quo* pending judicial review of agency action. This power or jurisdiction is part of the court's traditional means for promoting the administration of justice or is conferred by the All Writs Act, 28 U. S. C. Section 1651 (a).

A court is generally asked to use this power by a party who is involved in a controversy with an agency and who, while the agency proceeding is under way, exercises a right to appeal from a preliminary or collateral agency action which nonetheless determines certain of his rights. The appealing party asks the court which will decide the merits of the appeal to enjoin the agency proceedings until the merits of the appeal are resolved so that the court's decision on the merits will not be rendered nugatory because the agency proceeding has advanced and consequently circumstances have changed. While a court has the historic power to grant a temporary injunction, a court also has broad discretion on whether to grant this temporary stay or not.

The district courts have been and will be called upon to decide whether agencies should supply information pursuant to the FOIA to parties involved in agency proceedings. If the party appealing an agency's refusal to supply information requests the court to temporarily enjoin the agency proceeding until the appeal is decided, a court should grant this stay because of the purpose of the FOIA, the great probability that the appeal will be successful, and the irreparable harm that will result if the injunction is not granted and the party is required to continue in the agency proceeding without the requested information to which he is entitled under the FOIA.

The *amicus* will first discuss the general power of an equity court to enjoin on-going agency proceedings and then turn to the application of this power to matters arising under the FOIA.

ARGUMENT.

I. A District Court Has Jurisdiction to Temporarily Enjoin On-going Agency Proceedings in Order to Preserve the Status Quo Pending Judicial Review of Agency Action.

The power of a court in equity such as a district court to grant temporary injunctions in order to preserve the *status quo* pending judicial review of agency action has been long recognized by this Court. An illuminating discussion is provided by the opinion of Justice Frankfurter speaking for this Court in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4 (1942). There, the agency urged that in the absence of specific statutory authorization, a court lacked power to stay the execution of an agency order pending a determination by the court of the merits of an appeal from that order. Justice Frankfurter observed:

"The power to stay [is] so firmly imbedded in our judicial system, so consonant with the historic procedures of federal appellate courts . . . [it is] part of its traditional equipment for the administration of justice . . ." (at pp. 9 and 13)

This power to stay has been more recently discussed in *Federal Trade Commission v. Dean Foods Co., et al.*, 384 U. S. 597 (1965). Here an agency requested that the court grant a temporary injunction to preserve the *status quo* pending the agency's final decision in the case. This Court said that the statute (the Clayton Act) gave reviewing power to the appellate court and this grant included the "traditional power to issue injunctions to preserve the *status quo* while administrative proceedings are in progress and prevent impairment of the effective exercise of appellate jurisdiction." However, power to grant this preliminary relief was not derived from the Clayton Act but rather from the All Writs Act "and its predecessors dating back to the first judiciary act of 1789. Congress has never restricted the power which courts of appeals may exercise under [that] Act." This Court continued:

"The All Writs Act, 28 U. S. C. Section 1651(a), empowers federal courts to 'issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usage and principles of law.' . . . Decisions of this court 'have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels . . . such power has been deemed merely incidental to the courts' jurisdiction to review final agency action . . ." (at pp. 603, 604, and 608)

Whether or not an administrative act is final, "depends not upon the label affixed to its action by the administrative agency but rather upon a realistic appraisal of the consequences of such action."¹ A court has jurisdiction to review administrative orders under the All Writs Act when they impose an obligation or

1. *Isbrandtsen Co. v. United States*, 211 F. 2d 51 (CA DC, 1954), cert. denied 347 U. S. 990 (1954), at 55. In *Rochester Tel. Corp. v. United States*, 307 U. S. 125 (1939) this Court eliminated the distinction between affirmative and negative orders as a criterion for determining whether an agency action was reviewable, observing that both a negative order retaining the *status quo* and an affirmative order directing change determine a party's rights.

deny a right and the order need not be the last order of the agency.

While in *Dean* an administrative agency sought a temporary injunction, it is reasonable that this Court's observation has equal vitality when a party involved in a controversy with an agency seeks a temporary injunction to preserve the *status quo* pending judicial determination of whether an agency properly imposed an obligation or denied a right. *Scripps-Howard, supra*.

The lower courts have recognized that a court of equity such as a district court has an inherent power to enjoin agency proceedings pending judicial review of agency action. The Court of Appeals for the District of Columbia stated that under the All Writs Act courts have the power to "grant an injunction during pendency of an appeal or to make any order appropriate to preserve the *status quo* or the effectiveness of the judgment subsequently to be entered." *Application of President and Directors of Georgetown College, Inc.*, 331 F. 2d 1000, 1005 (CA DC, 1964), cert. den. 377 U. S. 978 (1964).

In *Isbrandtsen Co. v. United States, supra*, a court issued a temporary injunction against the Federal Maritime Board's interim approval of a rate system pending a formal hearing. While the Board's approval was only interim, the court reasoned that the rate system had an immediate effect upon the petitioner and therefore was final for the purposes of review.²

These cases illustrate the lower courts' recognition of this Court's observation in *Scripps-Howard* that the power to issue a temporary injunction to preserve the *status quo* pending judicial review of an agency's action is "as old as the judicial system of the nation." (at 17).

Whether this power in equity courts is based upon the All Writs Act or upon the inherent power to "do all things that are reasonably necessary for the administration of justice within the

2. For cases holding similarly see *Eastern Greyhound Lines v. Fusco*, 310 F. 2d 623 (CA 6, 1962) and *Isbrandtsen Co. v. United States*, 81 F. Supp. 544 (SDNY, 1948).

scope of its jurisdiction, and for the enforcement of judgments and mandates [...] only an express Congressional directive can divest the courts of this jurisdiction. As this Court has recognized: "We cannot but think that if Congress had intended to make such a drastic departure from the traditions of equity practice, an unequivocal statement of its purpose would have been made." *Hecht Co. v. Bowles*, 321 U. S. 321, 329 (1944).

Therefore, when a statute is silent on whether or not a district court can enjoin temporarily on-going agency proceedings, this statutory silence in no way implies that the court lacks the traditional equity power to protect its jurisdiction by issuing a temporary injunction. As this Court observed in *Scripps-Howard*, *supra* "the search for significance in the silence of Congress is too often the pursuit of a mirage." Congress did not expressly authorize stay orders, but a "denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxilliary powers to federal courts . . . Where Congress wished to deprive the courts of this historic power, it knew how to use apt words . . ." (at pp. 11 and 17).

The more general principles set out above can be applied to the statute here under consideration, the FOIA. Thus, while the FOIA is silent on whether district courts have jurisdiction to temporarily enjoin on-going agency proceedings, this silence should not deprive the courts of their traditional equity powers. The FOIA gives these courts exclusive jurisdiction to review and enforce claims for information brought under that statute. If the court lacks the power to temporarily stay the agency proceeding while it reviews an FOIA claim, its ruling on the merits of that claim may well occur only after the agency proceedings have far advanced or concluded so that while the court may find the claim has merit, this ruling will be nugatory to the interested party. To protect their jurisdiction to enforce FOIA claims, that is, to make their rulings effective to con-

3. *Morrow v. District of Columbia*, 417 F. 2d 728, 737 (CA DC, 1969).

cerned parties, a district court also must have power to enjoin on-going agency proceedings until the court is able to review and decide the merits of the FOIA claim.

II. A District Court Properly Exercises Its Discretion When Its Enjoins On-going Agency Proceedings Until the Court Determines Whether Parties Before the Agency Are Entitled to the Documents Sought Under the FOIA.

While it is well established that a district court has the power or jurisdiction to enjoin on-going agency proceedings until judicial review of agency action can occur, it is also true that it is within the court's discretion whether to exercise this power or not. Before discussing the variables which determine when it is appropriate for a court to exercise its power to temporarily stay on-going agency actions, it is well to distinguish between the doctrines of exhaustion of administrative remedies and interim relief.⁴ While failure to make this distinction will not necessarily yield an improper result since, as will be seen, irreparable harm is a factor common to both doctrines, if the distinction is made in judicial decisions these decisions will not only have greater precedential value but also will help eliminate the confusion that exists between the two doctrines. Guidelines from this Court will therefore be extremely helpful.

A. The Doctrines of Exhaustion and Interim Relief Distinguished.

Briefly, while there is uncertainty in this area, the exhaustion doctrine appears to be correctly limited to cases where judicial review on the merits of an agency decision is sought before the agency has had a chance to complete its own procedures and to make a determination on the merits. A party seeking interim relief, however, as in the instant case, does not ask the court to judge the merits of the main agency proceeding, but rather seeks to temporarily enjoin that proceeding until the

4. *Murry v. Kunzig*, 462 F. 2d 871 (CA DC, 1972).

court can review on appeal an agency decision which, though preliminary and perhaps collateral to the main proceeding, effects with finality a party's rights. The party seeks to preserve the *status quo* so that he will not suffer irreparable injury by being required to continue in the main agency proceeding before the court can review and decide his appeal. A court granting this interim relief preserves as much as possible the *status quo* so that when it later decides the appeal, its decision will be meaningful to all parties and not rendered nugatory because the main agency proceeding has continued and circumstances have consequently changed. Following judicial determination of the appeal, the temporary injunction is lifted and the main agency proceeding can go forward to its conclusion.

As will be seen below, if a party requests information under the FOIA and the agency refuses this request, this refusal, though preliminary or collateral to the main agency proceeding, nonetheless immediately effects with finality the party's rights. Therefore, when a district court is asked to enjoin agency proceedings until it determines whether the party before the agency is entitled to information sought under the FOIA, the case appears to fall within the doctrine of interim relief rather than within the exhaustion doctrine. The party seeking the temporary stay is not asking the court to judge the merits of the main proceeding before the agency, but rather is asking the court to preserve the *status quo* until his claim under the FOIA is resolved so that he will not suffer irreparable harm by being required to continue in the agency proceeding before resolution of this claim. However, because of the judicial confusion between these two doctrines, this brief will first discuss the applicability of the interim relief doctrine to FOIA claims and then discuss the applicability of the exhaustion doctrine to these claims.

B. Under the Doctrine of Interim Relief a District Court Properly Exercises Its Discretion When It Enjoins On-going Agency Proceedings Until the Court Determines Whether Parties Before the Agency Are Entitled to the Documents Sought Under the FOIA.

In determining whether to exercise its power and enjoin on-going agency proceedings until it resolves claims made under the FOIA, a court can well consider the following factors:

First, is it likely that the party seeking the injunction will thereafter be successful in obtaining the requested information by order of the district court?

Second, will the party seeking the injunction be irreparably harmed if the injunction does not issue?

Third, would issuing the temporary injunction further the public interest?⁵

These factors are relevant not only to the instant case but also to other proceedings before other agencies where parties involved in litigation before these agencies seek to enforce in district court claims under the FOIA.

To evaluate the application of these factors to claims under the FOIA, it is first necessary to determine how that Act should be interpreted by the courts. The answer is apparent from the purposes of the Act, from its legislative history and from its explicit provisions.

The intent of Congress in drafting the FOIA was to establish a rule of general disclosure of agency information. This is apparent from the legislative history and from the provisions of the Act which require that the agency refusing to disclose information has the burden to prove that its refusal was proper because the requested information was exempted from disclosure

5. Compare *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921 (CA DC, 1958).

under specific statutory language. Sec. 552(b), (c), Sec. 553(a)(3).⁶

The purpose of the Act is expressed in a Report of the Senate Judiciary Committee:

"Knowledge will forever govern ignorance and a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both." S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).

Prior to the passage of the FOIA, agencies could withhold information from the public or aggrieved parties asserting that withholding was "in the public interest." There was no provision for judicial review of an agency's decision to withhold information. J. Katz, *The Games Bureaucrats Play*, 48 Texas L. Rev. 1261 (1970).

The Senate Report states "Innumerable times it appears that information was withheld only to cover embarrassing mistakes or irregularities. . ." (S. Rep. No. 813 at 3.) Section 552(c) was promulgated "to eliminate the loopholes which allowed agencies to deny legitimate information to the public and to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." (S. Rep. No. 813 at 3.) The purpose of Section 552(c) "is to make it clear beyond doubt that all materials of the government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions of subsection (b)." (S. Rep. No. 813, 10.)

The FOIA, then, was to be a rule of full agency disclosure. It is wholly consistent with this purpose that not only the "public" but also private parties involved in proceedings with an agency receive the benefits of disclosure bestowed by the Act. It is these parties, rather than the general public, who

6. *Legal Aid Society v. Schultz*, 349 F. Supp. 771 (U. S. D. C. N. D., California, 1972).

will be most often victimized by an agency's "embarrassing mistakes or irregularities." These irregularities and errors will go unnoticed and unremedied and may adversely affect significant rights, unless information is available to the parties involved in the agency proceeding.

The Senate manifested a direct concern for *parties* involved in controversies with an agency:

"requiring the agencies to keep a current index of their orders, opinions, etc. is necessary to afford the private citizen the essential information to enable him to deal effectively and knowledgeably with the Federal agencies. This change will prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but has been unavailable to the citizen simply because he had no way in which to discover it. . ." (S. R. No. 813 at 7.)

The House, too, displayed its concern for the rights of plaintiffs who, when involved in agency proceedings, seek information from the agency:

"Information sought by *plaintiffs* from Government is likely to be a perishable commodity and . . . delays . . . may result in substantive damage to *plaintiff's case*. In some circumstances, such foot-dragging in the courts can render the information totally useless, if and when it is ever made available by the Federal bureaucracy." (Emphasis added) (H. R. No. 92-1419, 92nd Cong. 2nd Sess. 2 (1972))

Thus, Congress quite clearly foresaw and intended the application of the Information Act in pending matters. In addition, H. R. No. 1497, 89th Congress, 2d Sess. 8 (1966) stated:

" . . . a final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if . . .

"(i) it has been . . . made available or published as provided by this paragraph . . ."

The *right to know* then was accorded to both plaintiffs and defendants in an agency proceeding and to the public at large.

Because the FOIA mandates full agency disclosure and imposes upon the agency the burden to prove non-disclosure is proper, it is highly probable that a party in controversy with an agency will be successful in obtaining the requested information by order of the district court when this information is readily and specifically identified or identifiable. But if this success is not to be illusory and the information totally useless, it must be furnished to the requesting party before the agency proceeding has been completed or has far advanced and before the agency views have been fixed. That is, the information will enable a party effectively and intelligently to deal with an agency only if it is produced when the agency proceeding has not far progressed. Therefore, it makes sense to enjoin the agency proceeding until the agency furnishes the requested information either voluntarily or pursuant to order of the district court. The alternative is to require a litigant involved in an agency proceeding who has been denied information by the agency to pursue simultaneously two parallel courses of litigation,—his suit for information in the district court and the underlying agency proceeding itself. However, while he continues in the agency proceeding he does not have access to the information and is therefore unable to knowledgeably deal with the agency. This is a situation that the FOIA sought to correct. Therefore, it is entirely consistent with the Act's philosophy and purpose that the agency proceeding be stayed while the claim under the FOIA is being resolved. In this way, consistent with the intent of that Act, a party will not be required to continue in an agency proceeding until he has access to information that will enable him to deal effectively with the agency.

However, because courts of equity have required a showing of irreparable harm prior to issuing temporary restraining orders, it is necessary to determine what is required to establish irreparable harm in cases arising under the FOIA. Because, con-

sistent with the purpose of the FOIA, a party should not be required to continue in an agency proceeding until he has information properly disclosable under the Act, it is apparent that the agency proceeding must not proceed when the agency has refused to disclose information relevant to the adjudication of a party's legitimate interests. Consequently, the initial refusal to disclose information should be presumed to constitute the requisite injury warranting injunctive relief to stay the Agency's proceedings pending the resolution of the FOIA claim. This presumption is particularly justified when a party is dealing with agencies which make significant decisions which effect with finality a party's rights and which are not reviewable by any court.⁷

There are further justifications for this presumption:

First, a party engaged in proceedings before an agency cannot be reasonably expected to *prove* that the non-disclosure of the specific contents of documents causes him irreparable harm when he has had no opportunity to inspect these documents.

Second, the injury to a party's interest which results from an agency's refusal to disclose information promptly is inherently

7. The General Counsel of the National Labor Relations Board is such an agency and *Sears, Roebuck and Co. on its own behalf and on behalf of other charging parties under the National Labor Relations Act, Petitioner, v. National Labor Relations Board and Eugene G. Goslee, Acting General Counsel, in his own behalf and as agent for the National Labor Relations Board, Respondents*. On petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. (No. 72-1503), presents the question as to what an aggrieved party need establish to render himself entitled to an injunction staying the General Counsel's proceeding pending that agency's compliance with its obligations under the FOIA. The Court of Appeals found that absent a showing of irreparable injury such an injunction is not warranted. In seeking certiorari, the Petitioner is contending that when the General Counsel refuses to make available to parties involved in his proceedings, documents constituting his final decisions and relevant to the current proceeding, such unlawful non-disclosure should be *presumed* to result in irreparable injury warranting immediate injunctive relief, staying the proceeding pending the General Counsel's compliance with his duties of disclosure under the FOIA.

irreparable. Even if an appellate court were to rule that the information improperly withheld denied the aggrieved party a fair hearing, the remand to the agency for a new hearing is wholly inadequate relief. In many agency proceedings, when the remand occurs only after an extended period of time has passed, witnesses necessary to the party will be unavailable or their memories will have dimmed with the pass of time so that even furnished with the information initially requested, a party's chance to successfully prosecute or defend his case in the second hearing is severely diminished. He may well lose the controversy because the information ~~was~~ initially denied and nonetheless the agency proceeding continued. This is precisely what Congress intended to preclude by the FOIA. In addition, the second hearing which could have been avoided if the district court enjoined the agency proceedings until it determined whether the party was entitled to the information sought under the FOIA, will be largely a duplicate in terms of time and expense of the first hearing. The avoidance of such duplicative and repetitive proceedings is an approved objective of our legal system.⁸

While in *Myers v. Bethlehem Shipbuilding Corp., Ltd.*, 303 U. S. 41 (1938) this Court observed that:

"... [T]he rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere holding of the prescribed administrative hearing would result in irreparable damage[.]" at 51-52.

the significance of this observation should not be overstated but rather confined to the facts of the case and the time of the decision. When *Myers* was decided, agencies were new and fighting for their lives and therefore judicial protection was legitimate and consistent with Congressional purpose.⁹ In addi-

8. *U. A. W. v. Scofield*, 382 U. S. 350 (1965).

9. Jaffe, *Judicial Control of Administrative Action*, 1965, pp. 432-435.

tion, the issue in *Myers* was whether the business operation of an employer affected interstate commerce, a question of fact which required agency expertise and discretion to resolve. However, in dealing with issues arising under the FOIA other counterbalancing considerations arise. For one thing, the resolution of a claim brought under the FOIA does not require agency expertise or discretion, but only judicial interpretation of that Act. Therefore, there is no necessity to withhold interim relief out of respect for agency expertise. For another, the concern of Congress has shifted from agency independence to the protection of the rights of individuals involved in controversies with an agency. Congress was concerned that a private party would lose a controversy with an agency because of information which the agency utilized but which was denied to the party. Consistent with this concern, this Court should not require an individual to advance through even one agency proceeding unless he possesses the information to which he is entitled pursuant to the terms of the FOIA and with which he can argue on even terms with the agency. To accomplish this end, and to act consistent with Congressional concern, this Court should permit district courts to enjoin on-going agency proceedings pending the agency's compliance with the directives of the FOIA.

Additionally, when issues arise under the FOIA, the temporary injunction will further the public interest. Because the FOIA is to be a rule of full agency disclosure, not only to the public but also to persons involved in controversies with an agency, and because agencies have been known to refuse requests for information made pursuant to the Act, immediate injunctive relief until the FOIA claim is resolved is wholly consistent with public policy. This temporary injunction will not affect the agency's main proceeding or encroach upon its statutory jurisdiction. Such an injunction will, however, discourage future agency procrastination in disclosing information and will compel respect for the purpose of and the philosophy behind the Act.

C. Under the Doctrine of Exhaustion, a District Court Properly Exercises Its Discretion When It Enjoins On-going Agency Proceedings Until the Court Determines Whether Parties Before the Agency Are Entitled to Documents Sought Under the FOIA.

Among the factors generally considered in determining whether administrative remedies must be exhausted are the availability of these remedies to the aggrieved party and whether he will suffer irreparable harm if the court does not intervene and enjoin agency action.

In the instant case, as correctly found by the court below, there are no administrative remedies under the FOIA.

"Once a party has properly requested information from an agency, he has exhausted all the administrative avenues of relief which the Act provides." 466 F. 2d 345 (1972) at page 358.

This quotation is applicable to agencies other than the Renegotiation Board. A district court has exclusive jurisdiction to determine the merits of claims under the FOIA and to order the production of wrongly withheld information. For example, when a party before the General Counsel of the National Labor Relations Board requests information from and is refused by the General Counsel he has no administrative avenue to follow to seek the information because the *Board* is not empowered to review the General Counsel's refusal to furnish information.¹⁰ Accordingly, when the General Counsel refuses to provide in-

10. Section 102.31 of the Board's Rules and Regulations empowers the Board to subpoena only evidentiary matter, not information, and moreover, it is the General Counsel, the defendant in an FOIA suit, who is empowered to enforce this subpoena. This argument is relevant to Petitioner's position in *Sears, Roebuck and Co. on its own behalf and on behalf of other charging parties under the National Labor Relations Act, Petitioner, v. National Labor Relations Board and Eugene G. Goslee, Acting General Counsel, in his own behalf and as agent for the National Labor Relations Board, Respondents*. On petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit. (No. 72-1503).

formation pursuant to a request under the FOIA, a party has exhausted all the administrative avenues of relief which the Act provides. The only remaining remedy is an action in the district court.

Therefore, administrative remedies are lacking under the FOIA. In addition, for reasons stated in Part B of this brief, when an agency disobeys the express statutory directive and refuses to produce requested information, this non-disclosure should as a matter of law constitute a presumption of irreparable harm warranting the district court to exercise its power and enjoin on-going agency proceedings until the agency complies with the request for information or until the status of the requested information is determined.

D. *Myers v Bethlehem Shipbuilding Corp.* Does Not Compel a Contrary Result.

An examination of *Myers v. Bethlehem Shipbuilding Corp.*, *supra*, and cases decided by this Court after *Myers* lead to the conclusion that exhaustion of remedies is not required when a district court is called upon to decide questions of statutory interpretation but, instead, is required when the court faces questions involving administrative expertise or agency discretion.¹¹ This distinction becomes clearer when such cases as *Leedom v. Kyne*, 358 U. S. 184 (1958); *Boire v. Greyhound Corp.*, 376 U. S. 473 (1964), and *McKart v. United States*, 395 U. S. 185 (1969) are compared with *Myers*. In *Myers*, the petitioner employer requested that the district court stay further NLRB hearings because the employer's business did not affect interstate commerce and therefore the Board had no jurisdiction to proceed. In denying the petitioner's request this Court observed that to allow the injunction would "... in effect substitute the District Court for the Board as the tribunal to hear and determine what Congress declared the Board exclusively

11. Davis, *Administrative Law Treatise*, Section 20.01 (1970 Supplement).

should hear and determine in the first instance." *Myers* at page 50. *Myers* then involved the factual determination of whether an employer's business affected interstate commerce. In order to make this determination the district court would have to evaluate the facts of the particular case rather than simply interpret a statute and the evaluation of these facts required the expertise that the Board is supposed to possess.

In *Leedom*, *supra*, however, the National Labor Relations Board, contrary to express statutory command, included professional employees in a bargaining unit with non-professionals without the approval of the former. This Court stated:

"The sole and narrow question presented is whether a Federal District Court has jurisdiction of an original suit to vacate [a] determination of the Board because made in excess of its powers." at 185.

Observing that the purpose of the suit was to strike down an order of the Board made "in excess of its delegated powers[,] . . ." and that the order deprived professional employees of a statutory right, this Court found that the district court had jurisdiction to enjoin the agency's proceedings.

However, in *Boire v. Greyhound Corp.*, *supra*, this Court held that a district court could not enjoin a National Labor Relations Board election where the petitioner claimed that the Board improperly determined the bargaining unit's composition. This Court observed that the National Labor Relations Act provides review procedures by the Board and the Courts of Appeals for election cases. *Kyne* and *Boire* can be reconciled. While *Kyne* did not speak of the exhaustion of administrative remedies, that case involved a legal issue of statutory interpretation while in *Boire*, the determination of the bargaining unit's composition required the expert evaluation of facts which the Board is said to be able to provide.

The distinction between issues involving statutory interpretation on the one hand and agency discretion or expertise on the

other is highlighted by *McKart, supra*. There the issue was whether an individual defending a criminal prosecution for refusing to submit to military induction is barred by the exhaustion doctrine from challenging the validity of a reclassification order because he did not take an administrative appeal from that order. No issue of administrative expertise was raised. This Court was called upon to interpret a statute and did so holding *McKart* was exempt from military service as an only surviving son. This Court observed that when agency expertise is necessary, it might be proper to require an individual to carry his case through the administrative process before he comes to court but where the only issue is statutory interpretation governmental interest in requiring exhaustion did not outweigh the burden to *McKart* because exhaustion would bar him from obtaining judicial review from the administrative order. While the *McKart* holding may in part have been based upon the hardship of going to jail without judicial review of an administrative order if exhaustion were applied, the distinction between questions involving statutory interpretation and those involving an evaluation of facts and administrative expertise is sound when *McKart* is compared with *Myers* and the other cases cited in this subsection.¹²

The lower courts have recognized and followed this distinction. For example, in *Leedom, et al. v. Norwich, Connecticut Printing Specialties & Paper Products Union, Local No. 494, et al.*, 275 F. 2d 628 (CA DC, 1960), *cert. den.* 362 U. S. 969 (1960) the court stated that if the National Labor Relations Board disregarded any statutory limitation on its discretion and thereby denied employees a statutory right, the district court should be upheld in granting a temporary injunction staying a representation election. However, if the Board merely exercised its discretion in resolving issues of fact to determine an appropriate bargaining unit, the district court

12. Davis, *Administrative Law Treatise*, Section 20.10 (1970 Supplement).

erred in enjoining the election. Similarly, in *Elmo Division of Drive-X Company v. Dixon*, 348 F. 2d 342 (CA DC, 1965) the plaintiff sought to enjoin the F. T. C. from continuing with a complaint proceeding because a consent decree in an earlier case required the Commission to proceed by reopening the case. The court of appeals distinguished *Myers* because the plaintiff in *Elmo* did not object to the Commission making factual decisions but only to the procedure the Commission chose in making them. The court remanded the case to the district court, strongly implying that an injunction against the Commission would be proper. In *Goodrich v. Federal Trade Commission*, 208 F. 2d 829 (CA DC, 1953) a district court properly enjoined an agency from enforcing a rule because the promulgation of this rule exceeded the agency's statutory authority. In *Jewel Companies, Inc. v. Federal Trade Commission*, 432 F. 2d 1155 (CA 7, 1970) an injunction was held to be proper where the Commission exceeded its statutory authority. The court in *Jewel* distinguished *Myers v. Bethlehem, supra*, on the basis suggested here.

Because suits by a party in district court to enforce claims under the FOIA do not involve questions of agency expertise or discretion but only questions of statutory authority or interpretation there is no need for the district court to require the exhaustion of administrative remedies even if such remedies exist. Thus, *Myers* does not conflict with the conclusion that a district court may assert its jurisdiction and exercising its discretion issue an injunction to temporarily stay the agency's proceedings until the court determines whether litigants before the agency are entitled to the information they seek pursuant to the directives of the FOIA.

E. Though Claims Pursuant to the FOIA Are Collateral to the Main Agency Proceeding, the District Courts May Enjoin the Main Agency Proceeding Until the FOIA Claims Are Resolved.

While the issues in the cases cited in Part D, above, involved the interpretations of an agency's enabling statute or agency expertise and while suits to enforce claims under the FOIA may be considered collateral to the main agency proceeding, this distinction should not prevent district courts in their discretion from enjoining agency proceedings until FOIA claims are resolved. The preliminary injunction granted by the district court will not change the ultimate power of the agency (whether the Renegotiation Board or other agency) to decide all questions within its statutory jurisdiction. The injunction however, does implement the Congressional intent by promoting agency respect for the directives of the FOIA because absent this injunctive relief an agency can delay disclosure while its proceedings continue so that the information when furnished is useless to the aggrieved party. While the interim injunction will delay agency proceedings pending resolution of the FOIA claim, this delay is simply the necessary consequence of the overriding Congressional concern for a party involved in an agency proceeding. Congress, by the FOIA, has decreed that such a party must have access to information that the agency uses to determine his rights before the agency proceeding advances, so that he will not lose a controversy with an agency because he does not have the relevant information relied upon by the agency and so that he will be able effectively to raise issues of fact or law before the agency has crystalized its views or made a decision.

CONCLUSION.

For the foregoing reasons the judgment of the Court of Appeals should be affirmed.

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SUPREME COURT, U. S.

SEP 26 1973

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-822

THE RENEGOTIATION BOARD,

Petitioner,

vs.

BANNERCRAFT CLOTHING COMPANY, INC.; ASTRO
COMMUNICATION LABORATORY, A DIVISION OF
AIKEN INDUSTRIES, INC.; DAVID B. LILLY CO., INC.,

Respondents.

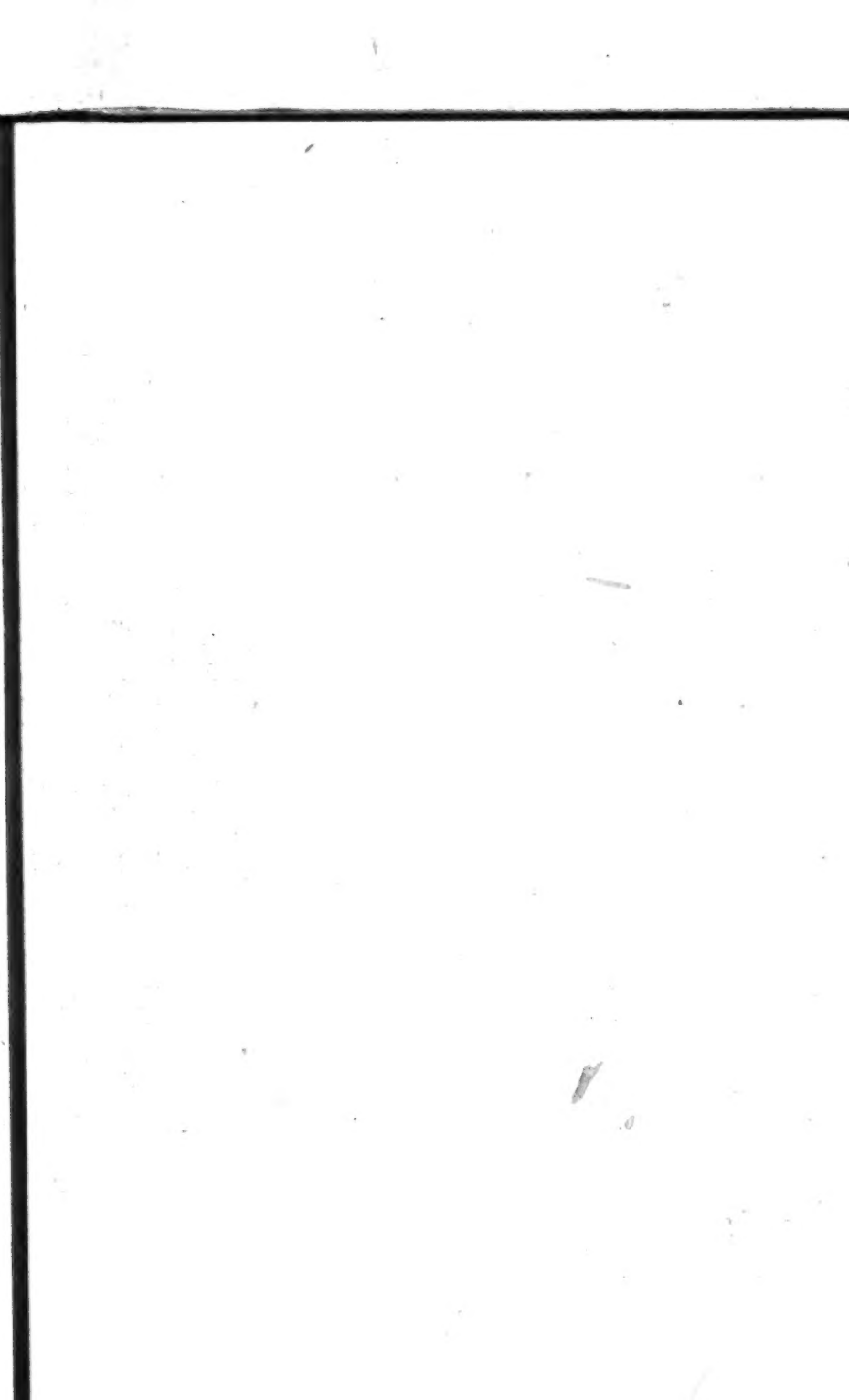
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**BRIEF FOR SEARS, ROEBUCK AND CO. AS
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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR SEARS, ROEBUCK AND CO. AS
AMICUS CURIAE**

INTEREST OF THE AMICUS CURIAE

The interest of Sears, Roebuck and Co. arises from its petition for certiorari now pending before the Court in *Sears, Roebuck and Co. v. National Labor Relations Board*, No. 72-1503. In the instant case, this Court will decide whether a federal district court ever has jurisdiction to enjoin an administrative proceeding where an agency fails to promptly produce information under the Freedom of Information Act, 5 U. S. C. § 552 (hereafter the "Act"). An integral part of this significant question—the threshold standard for irreparable injury which merits issuance of such an injunction—is presented in *Sears*.

Accordingly, Sears moved the Court to postpone oral argument in the instant matter in order to enable joint consideration of the two cases. Although the Court denied that motion, Sears was afforded status as an *amicus curiae*.

SUMMARY OF ARGUMENT

This brief, rather than reiterate the arguments already made by Respondents, is initially addressed to discussing the relationship between the availability of the equitable remedy in dispute and the three principal concerns confronting Congress during the drafting of the Information Act. *First*, as the Government concedes (Br., pp. 12-14), Congress desired to insure that, instead of being used as authority to refuse disclosure, as had the predecessor provision of the Administrative Procedure Act, the Information Act would require "that all documents must be disclosed except those mentioned in specific, narrowly drawn exceptions." 466 F. 2d at 353 (Pet. A. 15). *Second*, Congress recognized that effective disclosure has an additional, temporal dimension. Therefore, to assure that the disclosure would be of "practical value" (S. Rep. No. 1219, 88th Congress, 2d Sess. (1964), p. 7) (hereafter "S. Rep. No. 1219"), Congress required not only disclosure, but *prompt* disclosure. The Government, while it has not disputed the inclusion of promptness in the Congressional scheme, has failed to explain how that mandate can be otherwise enforced without resort to equitable relief. *Third*, in light of the constitutional defenses raised uniformly by the various agencies during the Congressional hearings,¹ it is evident that Congress wished to make its contrary position "clear that district courts shall have [this] power" (S. Rep. No. 1219, p. 7) to force the executive branch to

1. See, e.g., Hearing before a Subcommittee of the House Committee On Government Operations on Federal Public Records Law, 89th Cong. 1st Sess. (March-April, 1965), pp. 6-15, 22-24, 57, 60, 66, 103-105, 108 and 207 (hereafter referred to as "Hearings, 89th Cong. (1965)"), and n. 9 at p. 7, *infra*.

produce documents and to "punish for contempt" executive officers should they fail to conform to its orders. 5 U. S. C. 552(a)(3). It is, *inter alia*, the government's failure now to recognize this traditional confrontation between the branches of the federal government that was at the forefront during the early formulation of the Information Act, that accounts, in part at least, for its misconstruction of the Information Act.

ARGUMENT

1. Integral to the scheme of disclosure contemplated by the Information Act is the Congressional mandate "that production [of public documents by the agencies] be 'prompt.'" *National Cable Television Assn. v. F. C. C.*, 479 F. 2d 183, 188, n. 11 (D. C. Cir. 1973). "[I]nformation sought by plaintiffs from the government is likely to be a perishable commodity. . . ." The emphasis on "prompt" production—not simply production—is a clear recognition that expedition of disclosure is necessary to prevent "substantive damage to [a] plaintiff[s] case." H. R. Report No. 92-1419, p. 74. Accordingly, as the court below concluded, ". . . temporary stays of pending administrative proceedings may be necessary on occasion to enforce the policy of Freedom of Information Act. . . ." 466 F. 2d at 354 (Pet. A. 16). That power, included within an express delegation by Congress to "issue writs necessary or appropriate in aid of [its] jurisdiction" (28 U. S. C. § 1651), is a basic judicial tool. The very core of this well-established ancillary jurisdiction is the power to maintain the *status quo* pending the completion of litigation when equity so requires.³ Nowhere in the Act, or in its legisla-

2. Administration of the Freedom of Information Act, Twenty-First Report by the Committee on Government Operations, H. R. Report No. 92-1419, 92nd Cong., 2nd Sess. (1972), p. 74 (hereafter "H. R. Report No. 92-1419").

3. See the discussion by the court below at 466 F. 2d at 352-4 (Pet. A14-16), and also *Murray v. Kunzig*, 462 F. 2d 871 (D. C. Cir. 1972), *pet. for cert. granted sub. nom. Kunzig v. Murray*, No. 72-403; and *Sandra Drew v. Liberty Mutual Insurance Co.*, . . . F. 2d . . . , 5 EPD ¶ 8652 (5th Cir., June 4, 1973), *pet. for cert. pend. sub nom. Liberty Mutual Insurance Co. v. Sandra Drew*, No. 73-312, in which the Fifth and District of Columbia Circuits both disregarded legislative histories precluding judicial intrusion. The crucial rationale was that in both instances, as here, the courts were only maintaining the *status quo* without altering agency decisional processes.

tive history, is there any indication that Congress intended to restrict traditional ancillary jurisdiction. Such a withdrawal of power can not, as the Government contends, be "inferred merely because Congress failed specifically to repeat the general grant of auxiliary power to the Federal courts." *Scripps-Howard Radio, Inc. v. F. C. C.*, 316 U. S. 4, 11 (1942); *F. T. C. v. Deans Foods Co.*, 384 U. S. 597, 609 (1966).⁴

2. The government's effort to construe the Act as limiting judicial, rather than executive, power is not new. The history of the Information Act, in fact of the entire Administrative Procedure Act,⁵ is a continuing story of efforts by the executive branch to evade judicial regulation. See, e.g., *Abbott Laboratories v. Gardner*, 387 U. S. 136 (1961). From the very inception of the Act, administrative agencies have opposed its passage and implementation. Indeed, "[d]uring the hearings on bills which became the [Information Act], no witnesses testifying for government agencies supported the legislation". H. R. Rep. No. 92-1419, p. 20. The government's present effort to emasculate the effectiveness of the Information Act is thus a continuation of both its original opposition to the legislation and the subsequent, prevalent agency attitude of uniformly resisting all requests for information. *Vaughn v. Rosen*, U. S. App. D. C., F. 2d (No. 73-1039, Aug. 20, 1973)⁶ In short, through delaying disclosure until

4. To deviate from this rule of construction would have mischievous effects on the entire scheme of judicial administration. See *Virginia Petroleum Job Ass'n v. Federal Power Commission*, 259 F. 2d 921, 924 (D. C. Cir. 1958), where the court, including the present Chief Justice, relied on this rule of construction to stay agency proceedings pending appeal.

5. The Information Act (P. L. 89-487, 80 Stat. 250 (1966)) was codified in 5 U. S. C. § 522, substantially revising Section 3, the public information section, of the Administrative Procedure Act, 5 U. S. C. (1964 ed.) 1002.

6. One Congressional committee enumerated thusly the "road-blocks" created by the government (H. R. Report, No. 92-1419, p. 20):

[Continued on next page]

the immediate need that motivated a request for information has passed, agencies discourage those with the "greatest interest in obtaining disclosure" (*Id.* at p. 8), and, therefore, the greatest incentive to expend time and money to establish public, as well as private, rights under the Act.

3. The government's position is that, since the legislative history of the substantive disclosure provision of the Information Act "reflects the congressional purpose of 'providing a workable formula which encompasses, balances, and protects all interests'" (Gov't br., p. 15), a limitation on the judicial power to enforce the Act must be inferred from Congressional silence. Such a contention is specious. The target of the Act, with its "narrowly delineated" (*E. P. A. v. Mink*, 93 S. Ct. 827, 837 (1973)) exemptions and the allocation of the burden of proof on the defendant agencies (*Vaughn v. Rosen*, *supra*) was, unmistakably, the historical abuses of the executive department, not the judiciary. The "general objective" of the Information Act, whether in the context of litigation,⁷ administrative rule making,⁸ or negotiations, is "to enabl[e] the public

Nearly all agencies move so slowly and carefully in responding to a request for public records that the long delay often becomes tantamount to denial.

Dozens of agencies have set up complicated procedures for requesting public records.

Many will respond only to repeated demands for information, filed formally and in writing. Others require detailed identification of the records sought, so that only those who have complete knowledge of an agency's filing system can identify properly the records sought.

Some agencies have harassed citizens who had the temerity to press their demands for public records; others, when forced to provide copies of government documents, have given out illegible copies.

7. S. Rep. No. 813, 89th Cong. 1st Sess. (1965), p. 7, where it was noted that one purpose of the Act was to "... prevent a citizen from losing a controversy with an agency. . . ."

8. See *National Welfare Rights Org. v. Richardson* (Civ. 2178-71, D.C. D. C., March 13, 1972), discussed in *Aguayo v. Richardson*, 472 F. 2d 1090, 1097 n. 10 (2nd Cir. 1973); cf. *Lewis-Mota v. Sec. of Labor*, 469 F. 2d 480 (2nd Cir. 1972).

readily to gain access to the information necessary to deal effectively and upon equal footing with the federal agencies." S. Rep. 1219, p. 3. Accordingly, where "information is necessary for the public . . . if it is to be able to deal efficiently with its government" (S. Rep. 1219, p. 4), the courts can not, without a clear indicia of a contrary Congressional intent, be assumed to be powerless to effectuate these objectives. Cf. *Abbott Laboratories v. Gardner*, *supra*.

An examination of the full history of the Act, including the early legislative hearings, also reveals why Congress concluded that an express reference to judicial enforcement was necessary "to avoid any possible misunderstanding as to the court's powers." S. Rep. No. 1219, p. 7. The position towards the proposed bills, which eventually developed into the Act, taken uniformly by the executive agencies led by the Justice Department, was that Congress could not pass any statute that required executive agencies to produce documents without contravening the separation of powers set forth in the Constitution; a position that the bill "can result in a valid enactment only if it leaves undisturbed the inherent authority of the executive branch to govern disclosure and nondisclosure of its records."⁹ It was in light of this latent constitutional confrontation, Sears suggests, that Congress felt it necessary "to make clear that the district courts shall have [the] power" (S. Rep. No. 1219, p. 7) to order disclosure and hold executive officers in contempt for non-production. To twist the statutory language, based on what is otherwise Congressional silence, would do a great disservice to the Act's salutary objective of regulating the previous abuses of the administrative agencies.

9. Hearings, 89th Cong. (1965) at 22, and *supra* n. 1 at p. 2. See also Hearings Before the Subcommittee On Constitutional Rights of the Senate Committee on the Judiciary, 85th Cong., 2nd Sess. on S. 921 and the Power of the President to Withhold Information From Congress, March-April, 1958, which was chaired by Senator Hennings who submitted one of the original bills (S. 2148, 85th Cong.) proposing the Information Act. See S. Rep. No. 1219, p. 9.

4. The significant issue which remains for this Court to resolve is when, and under what circumstances, can a federal court invoke its historic, equitable powers to enforce the Act. In formulating such a rule three factors, it is submitted, must be considered: (1) the Act's requirement, as previously described, that production be prompt; (2) the "perishable" (H. R. Rep. No. 92-1419, p. 74) nature of the information sought; and (3) the fact that the agency has sole possession of the documents and is the only party in a position to determine the impact of a requested document in a particular case. To accommodate these factors, a demonstration of an improper withholding of public documents must constitute a *prima facie* showing of irreparable harm sufficient to merit the issuance of injunctive relief staying administrative proceedings. The existence or absence of actual injury stemming from delayed disclosure can only be demonstrated by the agency, not the private plaintiff. Accordingly, without a rebuttable presumption of injury, administrative "foot dragging" (H. R. Rep. No. 1419, p. 74) will be able to render information sought "totally useless" (*ibid.*) through untimely production. Such a *prima facie* demonstration, coupled with a strong probability of success on the merits, should, absent countervailing equities, require issuance of an injunction.

Naturally, even assuming a *prima facie* case is established under the proposed rule, a traditional balancing of equities would be required. A court would consider whether other private parties would be adversely affected by a delay in the administrative proceeding, whether the plaintiff is seeking to avoid the application of law enforcement process to himself or whether the agency could demonstrate some special consideration which would render a stay unjust.¹⁰ In the absence of all of these

10. Although Sears, as an *amicus curiae*, does not seek herein to apply the facts of the instant case to the proposed rule, it must be noted that the government has raised only a single countervailing factor that might preclude the issuance of an injunction: the interest lost to the government on any liability that might be found. Assuming

countervailing factors, an injunction to stay administrative proceedings can have only one effect—to encourage the Congressional objectives of the Information Act.

CONCLUSION

For each of the foregoing reasons, it is respectfully requested that the decision of the District of Columbia Court of Appeals be affirmed.

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arguendo such a consideration might be sufficient to bar the issuance of an injunction, it must be noted that any injunction could be conditioned so as to minimize the impact of such a factor. For example, a court could, as a condition of issuing its injunction, require that the plaintiff accept a retroactive liability on the accrual of interest for some portion of the time lost during the production and utilization of the withheld documents. More importantly, however, it must be remembered, that the Information Act is new law. As elucidating court decisions construing the various portions of the Act issue, delay caused by uncertainty over the Act's requirements will correspondingly diminish.

CASES ADJUDGED
IN THE
SUPREME COURT OF THE UNITED STATES
AT
OCTOBER TERM, 1973

RENEGOTIATION BOARD v. BANNERCRAFT
CLOTHING CO., INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

No. 72-822. Argued October 17, 1973—Decided February 19, 1974

Respondents, whose profits on defense contracts are undergoing renegotiation pursuant to the Renegotiation Act of 1951, sued in the District Court under the Freedom of Information Act (FOIA) to enjoin petitioner from withholding documents that respondents had requested and from conducting any further renegotiation proceedings until the documents were produced. The District Court in each case granted injunctive relief. The cases were consolidated on appeal and the Court of Appeals affirmed, holding that the District Court had jurisdiction under the FOIA to enjoin administrative proceedings before petitioner Board and to order production of the documents. Though noting that the FOIA nowhere authorizes injunctions of agency proceedings, the court concluded that Congress intended to confer broad equitable jurisdiction upon the district courts and that "temporary stays of pending administrative procedures may be necessary on occasion to enforce [FOIA] policy." The court also concluded that contractors had to exhaust their administrative remedies only under the FOIA but not under the Renegotiation Act before they were able to request injunctive relief against renegotiation proceedings and that contractors' remedies before the Renegotiation Board

and *de novo* proceedings in the Court of Claims as provided under the Renegotiation Act were inadequate to prevent irreparable harm. Petitioner contends that the FOIA's provision in 5 U. S. C. § 552 (a) (3) for enjoining an agency from withholding its records and ordering the production of records improperly withheld from a complainant is the sole method of judicial enforcement. *Held*:

1. The FOIA does not limit the inherent powers of an equity court to grant relief, as is manifest from the broad statutory language that Congress used, with its emphasis on disclosure, its carefully delineated exemptions, and the fact that § 552 (a) vests equitable jurisdiction in the district courts. Pp. 16-20.

2. In a renegotiation case a contractor must pursue its administrative remedy under the Renegotiation Act and cannot through resort to preliminary litigation over an FOIA claim obtain judicial interference with the procedures set forth in the Renegotiation Act. *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752; *Lichter v. United States*, 334 U. S. 742; *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540. Pp. 20-25.

(a) It would contravene the Act's legislative purpose if judicial review by way of injunctive relief under FOIA were allowed to interrupt the process of bargaining that inheres in the statutory renegotiation scheme and would delay the Government's recovery of excessive profits. Pp. 20-23.

(b) The contractor through a *de novo* proceeding in the Court of Claims, where discovery procedures are available, is not limited in exercising its normal litigation rights. Pp. 23-24.

151 U. S. App. D. C. 174, 466 F. 2d 345, reversed and remanded.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, WHITE, and REHNQUIST, JJ., joined. DOUGLAS, J., filed a dissenting opinion, in which STEWART, MARSHALL, and POWELL, JJ., joined, *post*, p. 26.

Harriet S. Shapiro argued the cause for petitioner. With her on the brief were *Solicitor General Griswold*, *Assistant Attorney General Wood*, *Walter H. Fleischer*, and *William D. Appler*.

Robert L. Ackertly argued the cause for respondents *Bannercraft Clothing Co., Inc.*, et al. With him on the brief were *James J. Gallagher*, *Charles A. O'Connor III*, and *David V. Anthony*. *Burton A. Schwalb* argued the

cause for respondent David B. Lilly Co., Inc. With him on the brief were *Michael Evan Jaffe* and *Marian B. Horn*.*

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

Three cases, consolidated for hearing in the court below, raise the issue of the effect of the Freedom of Information Act (FOIA), 5 U. S. C. § 552, upon proceedings pending under the Renegotiation Act of 1951, c. 15, 65 Stat. 7, as amended, 50 U. S. C. App. § 1211 *et seq.* In particular, they concern the jurisdiction of a federal district court to enjoin the renegotiation process until an FOIA claim is resolved.

I

The three respondents, Bannerkraft Clothing Company, Inc., Astro Communication Laboratory, a division of Aiken Industries, Inc., and David B. Lilly Co., Inc., successor to Delaware Fastener Corporation, all possessed national defense contracts with a "Department" of the United States, as defined in § 103 (a) of the Renegotiation Act, 50 U. S. C. App. § 1213 (a). These agreements, therefore, under § 102 of that Act, 50 U. S. C. App. § 1212, were subject to renegotiation.

A. *Bannerkraft*. In 1966 and 1967, this respondent manufactured uniforms at a plant in Philadelphia. Its fiscal year was the calendar year. Because most of its production was subject to renegotiation, the company, for each of the two years, timely filed with the Renegotiation Board the financial statement required under § 105 (e) (1) of the Act, 50 U. S. C. App. § 1215 (e) (1). Rep-

*Briefs of amici curiae urging affirmance were filed by *Gerald C. Smetana*, *Lawrence M. Cohen*, and *Alan Raywid* for *Sears, Roebuck & Co.*, and by *Milton A. Smith*, *Mr. Smetana*, *Jerry Kronenberg*, and *Mr. Raywid* for the Chamber of Commerce of the United States.

representatives of the Eastern Regional Renegotiation Board then reviewed Bannerkraft's operations and conferred with its president. On February 20, 1970, the Regional Board, by letter, advised the contractor that it was recommending that Bannerkraft in 1967 had realized excessive profits in the amount of \$1,400,000, subject to the usual adjustment for state taxes measured by income and for any tax credit to which the contractor was entitled under § 1481 of the Internal Revenue Code of 1954, 26 U. S. C. § 1481.¹

Bannerkraft promptly requested that it be furnished, pursuant to 32 CFR § 1477.3 (1970),² with a "written summary of the facts and reasons" upon which the determination was based. It asserted, however, that "it is not possible to state [as the Regulation's proviso required] whether all relevant evidence has been submitted since we have never had in writing the basis upon which you made this determination." The Regional Board replied that because "the statement required by the regulation" was not submitted, "your request for a summary is defective."

Bannerkraft's response was that it had "submitted all of the evidence which it believes to be relevant to the

¹ Shortly prior thereto, the Regional Board advised the contractor that it had determined its excessive profits for 1966 to be \$75,000.

² "§ 1477.3 Furnishing of other statements.

"When a Regional Board has made . . . a final recommendation in a Class A case . . . and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board . . . will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement: *Provided*, That the contractor requests such a statement within a reasonable time after it has been advised of such final determination or recommendation, and states that it has submitted all the evidence which it believes to be relevant to the renegotiation proceedings."

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renegotiation proceedings," but that this was "without prejudice to an opportunity to offer evidence on the issues disclosed by the [Regional Board's] Summary of Facts and Reasons" and that the required statement was "somewhat meaningless when we do not have a written statement of the issue upon which you have made your finding."

On March 16, Bannerkraft, pursuant to the FOIA, made a written request of the Renegotiation Board that six categories of documents be produced.³ No response to this request was forthcoming.

In late April, the Board, by letters, notified Bannerkraft of its determinations that the contractor had realized excessive profits in the amount of \$75,000 for 1966 (the same figure determined by the Regional Board) and

³ The request was based on the decision, only six days earlier, in *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 138 U. S. App. D. C. 147, 425 F. 2d 578 (1970), that the Renegotiation Board was subject to the FOIA and that certain Board orders and opinions were accessible to the contractor after deletions made in the light of the Act's exemption provisions. See the same case on remand, 325 F. Supp. 1146, *aff'd*, —, U. S. App. D. C. —, 482 F. 2d 710 (1973).

The documents Bannerkraft requested were: (1) communications between the Board and other Government agencies with respect to Bannerkraft's renegotiable contracts for 1966 and 1967; (2) investigatory or other reports prepared by Board employees "containing facts which are relevant to the Board's determination as to Bannerkraft's renegotiable contracts" for the two years; (3) final opinions, and the like, and summaries on which determinations were based for the years 1962 through 1968 for 11 named companies engaged in similar manufacture; (4) facts upon which the Board concluded that Bannerkraft's pricing policy in 1966 was unreasonable; (5) identification of those manufacturers with which Bannerkraft's production cost was compared, as stated in the summary for 1966, with cross-reference to comparable data as to each of the 11 named manufacturers; and (6) the "procurement information," described in the summary for 1966, that the Board contended indicated that there was a lack of effective price competition.

\$1,450,000 for 1967 (an increase of \$50,000 over the Regional Board's determination).

Bannercraft then went to court. On May 1, it filed a complaint against the Board in the United States District Court for the District of Columbia, praying that the Board be enjoined from withholding the documents requested and from conducting any further renegotiation proceedings with Bannercraft for 1966 and 1967 until the documents were produced. The Board opposed the application for temporary relief and moved to dismiss. Judge Smith issued a temporary restraining order and, thereafter, a preliminary injunction, each without opinion, and stayed further Board proceedings.

In May, the Board issued a Statement of Facts and Reasons for Bannercraft's years 1966 and 1967. Bannercraft then made a further request for documents related to the factual basis for the Board's conclusions reflected in the Statement. In July, the Board responded. It produced some documents and, with respect to others, claimed exemption under 5 U. S. C. § 552 (b) ⁴ or asserted that the information sought was not covered by the Act.⁵

⁴ "§ 552.

"(b) This section does not apply to matters that are—

"(3) specifically exempted from disclosure by statute;

"(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency . . ."

⁵ The Board took the position (a) that the Board-agency communications, the investigatory and other reports, and the "procure-

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On August 4, the Board moved to dissolve the preliminary injunction. It took the position that its response to Bannerkraft's requests fulfilled its obligations under the FOIA. The District Court denied the motion. The Board then appealed.

B. *Astro*. This respondent's factual case is essentially the same as Bannerkraft's. The year at issue is the fiscal year ended September 30, 1967. Astro, pursuant to the FOIA, requested production by the Board of five categories of material.⁶ At a conference held on May 12, 1970, Astro was advised that the Board had made a tentative determination of excessive profits for the year in the amount of \$225,000. In July, the Board denied Astro's FOIA request.

ment information" (to the extent it consisted of written records), being the first, second, and sixth items specified in the request of March 16, were exempt under 3 U. S. C. §§ 552 (b) (3), (4), (5), and (7); (b) that the facts relied upon by the Board in concluding that Bannerkraft's pricing policy was unreasonable, that is, the fourth item in the request of March 16, and the identification of manufacturers, the fifth item, were not requests "for records"; and (c) that copies of clearance notices, orders, and renegotiation agreements issued with respect to the 11 companies named in the third item of the March 16 request, and with respect to manufacturers with whom Bannerkraft's production cost was compared, as called for by the fifth item, all with identifying details deleted, were supplied therewith. Beyond this, documents requested by Bannerkraft were refused.

⁶ These were all documents that constituted the Astro renegotiation report for the year; all documents in the file that analyzed "or in any way [bore] upon" Astro's treatment of selling expenses; all file documents that had to do with "Information received," as referred to in a stated communication from the Regional Board to Astro; all file documents that related to the reasons for the Board's order denying Astro's request to file an untimely application for commercial exemption; and all records that had to do with Astro's renegotiation for the year "to the extent that such documents have been generated by and are in the custody of either" the Regional Board or the Board itself.

On August 12, Astro filed its complaint against the Board in the United States District Court for the District of Columbia. It prayed for relief similar to that sought by Bannercraft. Judge Pratt enjoined the Board from continuing renegotiation proceedings with Astro. The court also ordered the Board to allow Astro, within 30 days, to inspect and obtain copies of all documents requested by Astro that the Board had no objection to turning over, and to submit to the court, *in camera*, all documents the Board objected to producing, with a statement of reasons for each objection. The Board appealed.

C. *Lilly*. This respondent's case is similar to the other two. In June 1970, Lilly and its predecessor in interest, Delaware Fastener Corporation, were advised by their renegotiator that he had made determinations of excessive profits for 1967 for Lilly in the amount of \$200,000 and for Fastener in the amount of \$500,000.⁷ On June 29, the two corporations asked the Board to furnish certain categories of information.⁸

No response was immediately forthcoming from the Board. On July 9, Lilly filed its complaint against the Board in the United States District Court for the Dis-

⁷ Delaware Fastener Corp. was merged into David B. Lilly Co., Inc., in 1970 after renegotiation proceedings as to each corporation had begun, but before Lilly's suit was instituted.

⁸ The corporations requested all communications between the Board and other governmental agencies concerning either corporation; all sections of the Report of Renegotiation prepared by the Regional Board; all analyses used in comparing either of the corporations "with other contractors or subcontractors and reflecting the facts relating to such comparisons"; all written communications between the Board and firms holding renegotiable contracts or subcontracts in any way concerning either of the corporations and their performance; and all intra-agency memoranda and written communications consisting of recommendations or analyses prepared by the Board in connection with the renegotiation proceedings.

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trict of Columbia, praying for an order compelling the Board to produce the documents demanded and restraining the Board from acting and, in particular, from requiring the contractors to elect a procedure until the documents had been produced and the contractors had been given a reasonable time to study them. Thereafter, the Board denied the request for information.

On July 31, Judge Jones issued an order temporarily restraining the Board from continuing renegotiation with Lilly and Delaware. Subsequently, the Board moved to dismiss the complaint or, in the alternative, for summary judgment. On September 1, a preliminary injunction was issued. The Board appealed.

The three appeals were consolidated and heard together in the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals, one judge dissenting, affirmed all three decisions. 151 U. S. App. D. C. 174, 466 F. 2d 345 (1972). It held that the District Court possessed jurisdiction under the FOIA to enjoin administrative proceedings before the Board and to order the production of appropriate documents. It concluded that, "although it is undeniably true that Congress was principally interested in opening administrative processes to the scrutiny of the press and general public" when it enacted the FOIA, "Congress was also troubled by the plight of those forced to litigate with agencies on the basis of secret laws or incomplete information." 151 U. S. App. D. C., at 181, 466 F. 2d, at 352. The court then described this latter congressional concern as a "subsidiary statutory purpose," citing excerpts from S. Rep. No. 813, 89th Cong., 1st Sess., 7 (1965), and from H. R. Rep. No. 1497, 89th Cong., 2d Sess., 8 (1966), and also citing 5 U. S. C. § 552 (a)(2). See *infra*, at 12 n. 9. It reasoned that, despite "the fact that the Act nowhere in terms authorizes . . . injunctions" of agency proceedings, in enacting the statute Congress intended

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to confer broad equitable jurisdiction upon the district courts, and that "temporary stays of pending administrative procedures may be necessary on occasion to enforce the policy" of the FOIA. 151 U. S. App. D. C., at 181-183, 466 F. 2d, at 352-354.

The court then turned to the exhaustion-of-administrative-remedies question. It observed that there is no general rule that it is always improper for a court to interfere with pending administrative proceedings, citing *McKart v. United States*, 395 U. S. 185, 193 (1969). It concluded that "when the purposes of the doctrine are individually measured against the facts of these cases, it is plain that no legitimate judicial policy would be served by depriving these appellees of the relief they seek." 151 U. S. App. D. C., at 184, 466 F. 2d, at 355. In effect, the court reasoned that contractors need exhaust only their administrative remedies under the FOIA, and not their administrative remedies under the Renegotiation Act, as a condition precedent to requesting injunctive relief against renegotiation proceedings. The court found the contractors' remedies before the Board and *de novo* proceedings in the Court of Claims inadequate to prevent irreparable harm.

The dissenting judge began with the accepted proposition that federal courts have only limited jurisdiction and that the majority's observation, to the effect that the "existence of present need for judicial intervention does have a bearing on both jurisdiction and exhaustion," is "an error bordering on constitutional dimensions," for the appellees' need "is wholly irrelevant to determination of the jurisdiction of the District Courts in these cases." 151 U. S. App. D. C., at 191, 466 F. 2d, at 362.

The dissent then turned to the principle that where a statute creates a right and provides a special remedy, that remedy is exclusive. Thus, in the FOIA, Congress

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gave the general public an express right of access to all Federal Government information not within the exempted categories. This right was enforceable by "the specific, narrow, remedies of an injunction against withholding agency records and an affirmative order to produce such records improperly withheld." *Ibid.* The dissent concluded that no jurisdiction to grant any other remedy was conferred by Congress and that the District Court, therefore, was without jurisdiction to enjoin the proceedings before the Renegotiation Board. Nothing in the congressional reports cited by the majority justified its contrary conclusion. The dissent further concluded that there was no suggestion that Congress had any concern with litigants before the administrative agencies, and that what they were concerned with was to make information available "to any member of the public without requiring any showing of need therefor." 151 U. S. App. D. C., at 192, 466 F. 2d, at 363.

The dissent also was at odds with the majority's disposition of the exhaustion issue. It asserted that the majority seriously misconstrued the intended functioning of the Renegotiation Board's procedures, namely, that controlled access to information concerning the Government's position plays a significant role in the administrative process; that interruption of the administrative proceedings totally destroys the balance of negotiating strength; and that the attempt to enjoin the ongoing negotiations was really not a request for relief under the FOIA but was a challenge to the Board's procedures themselves. 151 U. S. App. D. C., at 194-195, 466 F. 2d, at 365-366.

We granted certiorari, 410 U. S. 907 (1973), because of the importance of the issue of the impact of the FOIA upon long-established procedures of the Renegotiation Board.

II

Before considering the issue of the District Court's jurisdiction to enjoin a proceeding pending in the Renegotiation Board, it is helpful to review the provisions of the FOIA and of the Renegotiation Act of 1951:

A. *The FOIA.* This statute, 5 U. S. C. § 552, was enacted in 1966, 80 Stat. 383, as a revision of § 3 of the Administrative Procedure Act, 5 U. S. C. § 1002 (1964 ed.). S. Rep. No. 813, 89th Cong., 1st Sess., 3-4 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess., 1-6 (1966). It was amended by Pub. L. 90-23, adopted June 5, 1967, 81 Stat. 54.

Section 552 (a) states, "Each agency shall make available to the public" certain information of enumerated categories. This covers virtually all information not specifically exempted by § 552 (b). Section 552 (a)(2)* provides the sanction that a "final order, opinion, statement of policy, interpretation, or staff manual or instruc-

* "§ 552. Public Information; agency rules, opinions, orders, records, and proceedings.

"(a) Each agency shall make available to the public information as follows:

"(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

"(A) final opinions . . .

"(B) . . . statements of policy and interpretations . . . and

"(C) administrative staff manuals and instructions to staff that affect a member of the public;

" . . . A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

"(i) it has been indexed and either made available or published as provided by this paragraph; or

"(ii) the party has actual and timely notice of the terms thereof."

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tion" may not be relied upon as precedent by the agency against a party unless "it has been indexed and either made available or published," or unless a party has "actual and timely notice of the terms thereof." Section 552 (a) (3) specifically vests the District Court with jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld." It places the burden on the agency to sustain its action; it empowers the District Court to punish the responsible employee for contempt in the event of noncompliance; and it provides that the FOIA suit generally is to take precedence on the court's docket and is to be expedited on the calendar.¹⁰

B. *The Renegotiation Act of 1951.*¹¹ This statute, 50 U. S. C. App. §§ 1211-1233, enacted shortly after the close of World War II and at the height of the Korean conflict, recites that Congress had made available "extensive funds" for the execution of the national defense program and that "sound execution" of the program requires "the elimination of excessive profits from contracts made with the United States, and from related subcontracts." § 101, 50 U. S. C. App. § 1211. The Renegotiation

¹⁰ In pertinent part, § 552 (a) (3) provides:

"On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee . . . Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way."

¹¹ Predecessor renegotiation statutes are cited and described in *Lichter v. United States*, 334 U. S. 742, 745 n. 1 (1948).

Board is established as an independent agency in the Executive Branch to accomplish this objective. § 107, 50 U. S. C. App. § 1217 (a). The Board's functions are excluded from the operation of the Administrative Procedure Act (5 U. S. C. § 551 *et seq.*, and § 701 *et seq.*) except the public information section thereof (5 U. S. C. § 552). § 111, 50 U. S. C. App. § 1221.

The Board operates primarily by informal negotiation with the contractor and not by formal hearing. It is directed to "endeavor to make an agreement with the contractor . . . with respect to the elimination of excessive profits." § 105 (a), 50 U. S. C. App. § 1215 (a). The contractor subject to the Act must file, for its fiscal year, a detailed financial statement. § 105 (e)(1), 50 U. S. C. App. § 1215 (e)(1). On the basis of this statement an initial determination of excessive profits is made. From the date of filing of the statement, the Board has one year to commence proceedings¹² and, with stated exceptions, the renegotiation is to be completed within two years following its commencement or "all liabilities of the contractor . . . for excessive profits with respect to which such proceeding was commenced shall thereupon be discharged."¹³ § 105 (c), 50 U. S. C. App. § 1215 (c).

If the Board and the contractor do not agree, the Board by order determines the excessive profits. § 105 (a), 50 U. S. C. App. § 1215 (a). At the request of the contractor, the Board shall furnish it "with a statement of such determination, of the facts used as a basis

¹² Section 105 (c), 50 U. S. C. App. § 1215 (c), provides that, in the absence of fraud, malfeasance, or willful misrepresentation, all liabilities of the contractor for excessive profits shall be discharged if the "proceeding is not commenced prior to the expiration of one year following the date upon which such statement is so filed."

¹³ The respondents in the present litigation have agreed to suspend their limitation periods pending resolution of the FOIA claims. See 151 U. S. App. D. C. 174, 190 n. 12, 466 F. 2d 345, 361 n. 12 (1972).

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therefor, and of its reasons for such determination." *Ibid.* The contractor then may initiate a *de novo* proceeding in the Court of Claims,¹⁴ which has exclusive jurisdiction to determine the contractor's excessive profits. § 108, 50 U. S. C. App. § 1218 (1970 ed., Supp. II). The action "shall not be treated as a proceeding to review the determination of the Board," *ibid.*, and the Board's statement "shall not be used in the Court of Claims as proof of the facts or conclusions stated therein," § 105 (a), 50 U. S. C. App. § 1215 (a) (1970 ed., Supp. II).

The renegotiation process itself is initiated by notice to the contractor and by assignment of the contractor's report to the appropriate Regional Board. 32 CFR § 1472.2 (1972).¹⁵ Personnel of the Regional Board then prepare a "Report of Renegotiation" which includes a "recommendation with respect to the amount, if any, of excessive profits for the fiscal year under review." 32 CFR § 1472.3 (d). This is only the first of several steps within the agency structure. Thereafter the statement is reviewed, successively, by a panel of the Regional Board, by the Regional Board itself, and finally by the Renegotiation Board. At each level there is consultation with the contractor, the preparation of a report and analysis, and submission to the next higher level of a recommendation as to excessive profits. 32 CFR §§ 1472.3 (d) and (f)-(i), and §§ 1472.4 (b)-(d). At each stage, the contractor is entitled to a statement of the basis for the recommendation. Each level is free to make new findings and no level is bound by the deter-

¹⁴ Until July, 1971 the proceeding was to be initiated in the Tax Court. 65 Stat. 21.

¹⁵ The CFR citations throughout this section of this opinion are to the 1972 version of Renegotiation Board procedures in effect at the time of the Court of Appeals' decision. The regulations were amended substantially in the fall of 1972. See 32 CFR pts. 1400-1599 (1973).

mination of the level below; the recommended settlement may decrease or increase at each level. *Ibid.*

III

It is clear, we think, that the Renegotiation Board, as an entity, is not exempt from applicable provisions of the FOIA. The Board, of course, is an "independent establishment" in the Executive Branch. § 107 (a) of the Renegotiation Act, 50 U. S. C. App. § 1217 (a). But "agency" is broadly defined in the FOIA to mean "each authority of the Government of the United States," except the Congress, the courts, territorial governments, the government of the District of Columbia, and, with respect to 5 U. S. C. § 552, certain other specifically described entities and functions. 5 U. S. C. § 551 (1). The Renegotiation Board is not among those excepted. Further, the House Committee's discussion of the requirement of § 552 (a) (2), that an agency's concurring and dissenting opinions, as well as final opinions, be made available, discloses that a reason for this provision was that "a recent survey indicated that five agencies—including . . . the Renegotiation Board—do not make public the minority views of their members." H. R. Rep. No. 1497, *supra*, at 8. Thus, despite its unique operational methods, the Board falls within the definition of "agency" in the FOIA.¹⁶

So to conclude, however, does not provide automatically the answer to the question whether the FOIA authorizes a district court to enjoin Renegotiation Board

¹⁶ The Court of Appeals in the present litigation and other federal decisions have recognized the general applicability of the FOIA to the Renegotiation Board. See *Fisher v. Renegotiation Board*, 153 U. S. App. D. C. 398, 473 F. 2d 109 (1972); *Lykes Bros. S. S. Co. v. United States*, 198 Ct. Cl. 312, 327, 459 F. 2d 1393, 1401 (1972); *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 138 U. S. App. D. C. 147, 425 F. 2d 578 (1970).

proceedings until the court determines that the contractor is or is not entitled to information it claims under the FOIA.

As to this question, the respondent contractors assert that, although the FOIA does not grant this injunctive power in express terms, the power is to be implied from the court's inherent capacity to provide appropriate equitable relief. The Board, on the other hand, emphasizes that Congress in the Act expressly authorized the court to compel the production of agency records improperly withheld, placed the burden on the agency to sustain its action, and directed precedence on the docket for suits under the Act "over all other causes" and expedition of those suits "in every way." 5 U. S. C. § 552 (a) (3). The Board then contends that these provisions constitute the *exclusive* method for enforcing the disclosure requirements of the Act and that any implication of other injunctive power, at the behest of a litigant before the agency, would be inconsistent with the statutory language.

Clearly, as the Court of Appeals held, 151 U. S. App. D. C., at 181, 466 F. 2d, at 352, the Congress "was principally interested in opening administrative processes to the scrutiny of the press and general public when it passed the Information Act." The Second Circuit has described the Act's "ultimate purpose" as one "to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities" (footnote omitted). *Frankel v. SEC*, 460 F. 2d 813, 816, cert. denied, 409 U. S. 889 (1972). The Senate Report, too, expressed concern for "an informed electorate." S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965).¹⁷

¹⁷ Among other decisions emphasizing this general public purpose

Section 552 (a)(3) of the FOIA explicitly confers jurisdiction¹² to grant injunctive relief of a described type, namely, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." In addition, it provides a specific remedy for noncompliance.

This primary purpose of the FOIA, and this express grant of jurisdiction to enjoin in a specific way, coupled with a limited sanction, might suggest that the Act's provision for compelled production was intended to be the exclusive enforcement method. It has been held that "where a statute creates a right and provides a special remedy, that remedy is exclusive." *United States v. Babcock*, 250 U. S. 328, 331 (1919). And "Congress for reasons of its own decided upon the method for the protection of the 'right' which it created. It selected the precise machinery and fashioned the tool which it deemed suited to that end." *Switchmen's Union v. NMB*,

of the Act are *Ethyl Corp. v. EPA*, 478 F. 2d 47, 48 (CA4 1973); *Sterling Drug, Inc. v. FTC*, 146 U. S. App. D. C. 237, 242, 450 F. 2d 698, 703 (1971); *Soucie v. David*, 145 U. S. App. D. C. 144, 153, 448 F. 2d 1067, 1076 (1971); *LaMorte v. Mansfield*, 438 F. 2d 448, 451 (CA2 1971); *Bristol-Myers Co. v. FTC*, 138 U. S. App. D. C. 22, 25, 424 F. 2d 935, 938, cert. denied, 400 U. S. 824 (1970).

¹²S. 1666, 88th Cong., 2d Sess., was passed by the Senate on July 28, 1964, 110 Cong. Rec. 17066-17069, and reconsidered and passed again on July 31, 1964, 110 Cong. Rec. 17666-17668. There was insufficient time, however, for full consideration by the House. S. 1160, 89th Cong., 1st Sess., then became the FOIA and "is substantially S. 1666." S. Rep. No. 813, 89th Cong., 1st Sess., 4 (1965). There was no change in the remedy provided.

The Senate report which accompanied S. 1666 explains, "The provision for enjoining an agency from further withholding is placed in the statute to make clear that the district courts shall have this power." S. Rep. No. 1219, 88th Cong., 2d Sess., 7 (1964). In discussing the contempt provision, the Report states, "This is another addition which has been made to avoid any possible misunderstanding as to the courts' powers." *Ibid.*

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320 U. S. 297, 301 (1943). See *National Railroad Passenger Corp. v. National Assn. of Railroad Passengers*, 414 U. S. 453, 458 (1974). One therefore may argue, as the Board has argued here, that this is not a situation where "Congress has utilized . . . the broad equitable jurisdiction that inheres in courts and where the proposed exercise of that jurisdiction is consistent with the statutory language and policy, the legislative background and the public interest." *Porter v. Warner Holding Co.*, 328 U. S. 395, 403 (1946).

There is significant authority, however, that points to the opposite conclusion. *Porter* itself, although recognizing the kind of situation to which *Babcock* is applicable, 328 U. S., at 403, upheld broad equitable power in the District Court under a statute authorizing the court to grant injunctive and restraining relief "or other order," and did so, not only because of the presence of the "other order" language, but because of the "traditional equity powers of a court." *Id.*, at 400. Emphasis on broad equity power, even in the face of a silent statute, also appears in *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 290-291 (1960); *Scripps-Howard Radio, Inc. v. FCC*, 316 U. S. 4 (1942); *Arrow Transportation Co. v. Southern R. Co.*, 372 U. S. 658, 671 n. 22 (1963); see L. Jaffe, *Judicial Control of Administrative Action* 659 (1965), and is sometimes related to the All Writs Act, 28 U. S. C. § 1651 (a). *FTC v. Dean Foods Co.*, 384 U. S. 597, 603-604 (1966).

The broad language of the FOIA, with its obvious emphasis on disclosure and with its exemptions carefully delineated as exceptions; the truism that Congress knows how to deprive a court of broad equitable power when it chooses so to do, *Scripps-Howard*, *supra*, 316 U. S., at 17; and the fact that the Act, to a definite degree, makes the district courts the enforcement arm of the statute, 5 U. S. C. § 552 (a) (3), persuade us that the *Babcock* and

Switchmen's Union principle of a statutorily prescribed special and exclusive remedy is not applicable to FOIA cases. With the express vesting of equitable jurisdiction in the district court by § 552 (a), there is little to suggest, despite the Act's primary purpose, that Congress sought to limit the inherent powers of an equity court.

IV

We find it unnecessary, however, to decide in these cases, whether, or under what circumstances, it would be proper for the District Court to exercise jurisdiction to enjoin agency action pending the resolution of an asserted FOIA claim. We hold only that in a *renegotiation* case the contractor is obliged to pursue its administrative remedy and, when it fails to do so, may not attain its ends through the route of judicial interference. The nature of the renegotiation process mandates this result, and, were it otherwise, the effect would be that renegotiation, and its aims, would be supplanted and defeated by an FOIA suit.¹⁹

Before the adoption of the FOIA this Court consistently held that the design of the Renegotiation Act was to have renegotiation proceed expeditiously without interruption for judicial review, and that the Board's proceedings were not to be enjoined prior to the exhaustion of the administrative process. This was the result where the proceedings were challenged on constitutional grounds, *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752 (1947); *Lichter v. United States*, 334 U. S. 742, 789-793 (1948), on statutory grounds, *Macauley v. Waterman S. S. Corp.*, 327 U. S. 540 (1946), and on procedural grounds, *Lichter*, 334 U. S., at 791. The

¹⁹ See Note, 1973 U. Ill. L. F. 180, 191 (1973); Note, 51 Tex. L. Rev. 757, 785 (1973).

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Court's emphasis was on the absence of any "lawful function" on the part of the courts "to anticipate the administrative decision with their own," *Aircraft*, 331 U. S., at 767; on the availability of a due process hearing in the post-administrative *de novo* proceeding in the Tax Court, *Macauley*, 327 U. S., at 543, where constitutional as well as nonconstitutional issues could be resolved, *Aircraft*, 331 U. S., at 769 n. 30, citing 89 Cong. Rec. 9930 (1943),²⁰ and at 771; and on the Act's provisions for expeditious settlement in informal negotiation free "from the tedious burden of litigation." *Id.*, at 770.

In *Aircraft* the Court rejected arguments substantially the same as those advanced by the respondents here, 331 U. S., at 758 n. 12 (inability to participate effectively because of lack of information upon which the Board had relied, see No. 95, O. T. 1946, Tr. of R., Vol. I, p. 141), and refused to permit renegotiation to be enjoined. "To countenance short-circuiting of the Tax Court proceedings here would be, under all the circumstances but more especially in view of Congress' policy and command with respect to those proceedings, a long overreaching of equity's strong arm." 331 U. S., at 781.

Reflection upon the nature of the Renegotiation Board's process fortifies these conclusions. The character and the entire atmosphere of the process is negotiation—that is, renegotiation—of an existing contract. And negotiation is a bargaining process, with give and

²⁰ "The committee has provided that any contractor aggrieved by a determination of excessive profits under the old law, whether he was cooperative and signed a closing agreement or not, may have a review of that determination in the Tax Court of the United States and in the review have all issues, constitutional and otherwise, decided by the court." (Remarks of Cong. Disney.)

take, and with stress upon and use of the strengths of one's own position and the weaknesses of the position of the other party. It is in a process such as this where the phrase "leading from strength" has been so effectively transferred in practical application from the card table to the world of commerce. It is part of the warp and woof of production. It is pure bargaining—permitted by the statute with respect to contracts already made—the same kind of bargaining that produces the union-employer agreement or the transfer of substantial property from the willing seller to the interested buyer.

We see nothing in the adoption of the FOIA in 1966 that impinges upon the settled law of the *Aircraft-Lichter-Macauley* cases or that warrants an exception to the principle they espouse. Nothing new by way of due process emerged with the FOIA. Nothing therein indicates that Congress wished to change the Renegotiation Act's purposeful design of negotiation without interruption for judicial review. FOIA's stress was on disclosure, to be sure, but it was on disclosure for the public, *EPA v. Mink*, 410 U. S. 73, 80 (1973), and not for the negotiating self-interested contractor. *Id.*, at 86; see K. Davis, *Administrative Law Treatise* § 3A.4, p. 120, § 3A.29, p. 171 (Supp. 1970). And when Congress in 1971 reviewed the Renegotiation Act and substituted the Court of Claims for the Tax Court, no other significant change in the existing process was effected. See S. Rep. No. 92-245 (1971), accompanying H. R. 8311, which became the amending statute, Pub. L. 92-41, 85 Stat. 97.

It is no answer to say, as *Bannercraft* and *Astro* urge, that *Aircraft*, *Lichter*, and *Macauley* relate only to issues on the merits over which Congress had vested jurisdiction in the first instance in the Board and then in the Tax Court. We read those decisions otherwise.

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Seeking injunctive relief during the pendency of renegotiation encourages delay through resort to preliminary litigation over an FOIA claim. The delay is not imaginary or without ultimate consequence. The present cases provide an example of this, for each has been pending now for more than three years. The Government is foreclosed from taking action to recover excessive profits until the Board's final order is entered; even then, interest does not begin to run until 30 days after the entry of that order. 50 U. S. C. App. §§ 1215 (b)(1) and (2). The contractor, by delay, has little to lose and much to gain.

There is no limitation or denial of the contractor's normal litigation rights when the renegotiation process is at end. The contractor may institute its *de novo* proceeding in the Court of Claims, unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence. There the usual rights of discovery are available.²¹ And there the parties are not bound by a prior determination made at any level of the Renegotiation Board structure. 50 U. S. C. App. § 1218. That proceeding is the judicial remedy at law provided by the Renegotiation Act and is adequate protection against injury. Note, 41 Geo. Wash. L. Rev. 1072, 1084 (1973). We note that a contractor does not become obligated to remit excessive profits until termination of the Court of Claims suit, if it elects that course. The injury suffered, absent an injunction, is no more than the risk of being

²¹ The Court of Claims has been described, "by virtue of its role in the renegotiation process and its general expertise in the field of government contracts," as being "uniquely qualified to supervise discovery against the Renegotiation Board." Note, 41 Geo. Wash. L. Rev. 1072, 1084 (1973).

unsuccessful in the *de novo* bargaining process and the incurrence of the expense incident to renegotiation.²² Mere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52 (1938); L. Jaffe, *Judicial Control of Administrative Action* 429 (1965). Without a clear showing of irreparable injury, see *Virginia Petroleum Jobbers Assn. v. FPC*, 104 U. S. App. D. C. 106, 111, 259 F. 2d 921, 926 (1958), failure to exhaust administrative remedies serves as a bar to judicial intervention into the agency process. *Myers, supra*; *Sears, Roebuck & Co. v. NLRB*, 153 U. S. App. D. C. 380, 382, 473 F. 2d 91, 93 (1972).

Interference with the agency proceeding opens the way to the use of the FOIA as a tool of discovery, see *Sears, Roebuck & Co. v. NLRB*, 433 F. 2d 210, 211 (CA6 1970), over and beyond that provided by the regulations issued by the Renegotiation Board for its proceedings. See 32 CFR §§ 1480.1-1480.12 (1972).²³ Discovery for litigation purposes is not an expressly indicated purpose of the Act. Protection for the contractor in the renegotiation process is afforded through the injunctive power specifically bestowed by 5 U. S. C. § 552 (a)(3).

The Renegotiation Act and its predecessors obviously emerged from congressional awareness that, with the vastness of defense expenditure, overcharging and misappropriation of public funds by unscrupulous contractors and those fortuitously placed to perform needed work were almost inevitable. The target of the legis-

²² In this litigation there is no allegation or evidence that the Board was negotiating in bad faith or acting *ultra vires*. We therefore are not now concerned with the situation where allegations or evidence of that kind are present.

²³ Since the institution of these suits, the Board has amended its regulations to expand the discovery available to contractors. See 32 CFR §§ 1470.3, 1472.3 to 1472.6, 1474.3 to 1474.5 (1973).

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lation was excessive profit, not the fair and reasonable one. The latter was anticipated and accepted. The line between a reasonable profit and excessive profit is not always easily ascertained or brightly lit. But the ascertainment of excessive profits was a duty vested by the Congress in the Renegotiation Board in the first instance. The Board thus is the fulcrum of a process that enables the Government initially to consult a contractor, to make a contract with it, and then to have the contract subject to modification for excessive profits, whenever they materialize, without violation of the Due Process Clause of the Fifth Amendment. The disgorging of excessive profits is not by way of a tax, but the process is not unlike the imposition of a tax equivalent to the excessive profits. Congress' initial placing of the contractor-initiated final proceeding in the Tax Court is indicative of the relationship.

Of course, there is uncertainty in the renegotiation process. And, of course, that uncertainty is lessened or eliminated if the contractor, like the poker player, is able to ascertain all the cards in the Board's hand. There is risk, also, when the contractor accepts the determination of excessive profits made at any level of the renegotiation process. These risks, however, are the same risks that are inherent in the negotiation and voluntary settlement of any dispute. The one who pays possibly might pay less if he resorts to the factfinder instead of making the settlement. But he might pay more. That is the calculated risk he takes. It is the calculated risk provided for by Congress in the administrative process it prescribed in the Renegotiation Act. It is not a risk ungenerously laid upon the contractor, for it is counterbalanced by the profound interest of the public in the recapture of excessive profits that may flow to the contractor under its government contracts.

We stress, in conclusion, that the merits are not before us. They are yet to be decided by the District Court. Whether any demand made by these contractors is so vague as not to constitute a "request for identifiable records," 5 U. S. C. § 552 (a) (3), or is for material exempt from disclosure under 5 U. S. C. § 552 (b), are questions that remain open for decision on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART, MR. JUSTICE MARSHALL, and MR. JUSTICE POWELL concur, dissenting.

The Court reverses the Court of Appeals, saying that respondent-contractors had not exhausted their administrative remedies. At issue is whether data in possession of the Renegotiation Board and relevant to the controversy between respondents and that Board should be disclosed to respondents. That raises a question under the Freedom of Information Act. It is, I submit, clear that respondents had exhausted every known way to obtain those data through administrative channels. Nothing remained to be done at that level. The District Court is the enforcement arm of the FOIA. Today's decision, however, says that court cannot act. Hence respondents are without remedy. The end result is to make the FOIA a dead letter in this area. Hence my dissent.

The nature of the so-called administrative law aspects of the problems under the Renegotiation Act is unique. The aim, of course, is the elimination of excessive profits of contractors and subcontractors in the national defense program, 50 U. S. C. App. § 1211. Detailed financial information must be filed with the Re-

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negotiation Board, *id.*, § 1215 (e)(1). If on the basis of those data the Board decides to proceed, it refers the case to a Regional Renegotiation Board which determines tentatively the amount of excessive profits, 32 CFR § 1472.3 (e).¹ A conference with the contractor is then arranged. It may agree with the Regional Board's determination or contest it. If the latter, a second conference is held with a panel of the Regional Board which hears the arguments of the contractor and submits its recommendations to the Regional Board which may be for a greater or lesser amount than the original tentative determination, 32 CFR §§ 1472.3 (f), (h), (i). Thereupon the Regional Board makes its recommendation, *id.*, § 1472.3 (i). If the contractor is still dissatisfied, it can appeal to the Renegotiation Board itself. In that event the case is assigned to a division of the Board which is not bound by or limited to any finding or determination of the Regional Board, *id.*, § 1472.4 (b). The division studies the case *de novo* and makes a recommendation to the Board which then makes a determination greater than, equal to, or less than any of the prior determinations, *id.*, § 1472.4 (d). Even then the renegotiation process continues, the Board seeking to obtain the contractor's voluntary agreement. Only if that effort fails is a final order determining the amount of excessive profits made, *ibid.*

That is the end of the administrative road; but the contractor still has an appeal to the Court of Claims which may redetermine *de novo* what the excessive profits are, 50 U. S. C. App. § 1218 (1970 ed., Supp. II); and from the Court of Claims certiorari may be sought here, *id.*, § 1218a (1970 ed., Supp. II).

¹ The CFR citations throughout this opinion are to the regulations which were in effect in 1970. The regulations were substantially amended in the fall of 1972.

The history of the Act makes plain what can be inferred from the nature of the administrative process just described—that Congress chose negotiation, not confrontation or traditional adjudication, as the desirable route. The Act requires the Board to “endeavor to make an agreement with the contractor or subcontractor with respect to the elimination of excessive profits,” 50 U. S. C. App. § 1215 (a). The pressure is on the contractor to settle, as at each successive step in the procedure its liability may be increased. The standards are rather vague and imprecise, 50 U. S. C. App. §§ 1213 (e)(1)–(6),² the regulations stating that “[r]easonable profits will be determined in every case by over-all evaluation of the particular factors present and not by the application of any fixed formula with respect to rate of

² The Act provides: “In determining excessive profits favorable recognition must be given to the efficiency of the contractor or subcontractor, with particular regard to attainment of quantity and quality production, reduction of costs, and economy in the use of materials, facilities, and manpower; and in addition, there shall be taken into consideration the following factors:

“(1) Reasonableness of costs and profits, with particular regard to volume of production, normal earnings, and comparison of war and peacetime products;

“(2) The net worth, with particular regard to the amount and source of public and private capital employed;

“(3) Extent of risk assumed, including the risk incident to reasonable pricing policies;

“(4) Nature and extent of contribution to the defense effort, including inventive and developmental contribution and cooperation with the Government and other contractors in supplying technical assistance;

“(5) Character of business, including source and nature of materials, complexity of manufacturing technique, character and extent of subcontracting, and rate of turn-over;

“(6) Such other factors the consideration of which the public interest and fair and equitable dealing may require, which factors shall be published in the regulations of the Board from time to time as adopted.”

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profit, or otherwise," 32 CFR § 1460.8. The vagueness of the standards and the risk of an increase in liability at every level of the administrative process have a powerful coercive influence. Approximately 88% of the Board's cases are ended by voluntary agreement, coercive orders being entered in only 12% of the cases. See Fifteenth Annual Report, Renegotiation Board 13 (1970).

In the three cases involved in this litigation the District Court entered its stay order before the contractors had run the gantlet of the administrative process in the limited sense that each of them had another opportunity to negotiate a lower settlement with the Board, not counting a *de novo* hearing before the Court of Claims.

The documents which the contractors want are in possession of the Board. These documents, it is said, will reveal the strength or weakness of the Board's case against the contractors and the facts or assumptions on which the Board relies in assessing liability. Without those documents, it is said, any meaningful negotiation, envisioned by the Act, is difficult or impossible. Future *de novo* review is not meaningful, it is said, since the contractors are completely in the dark as to the practical considerations which could end the dispute, if the documents were made available. Disclosure of the documents aids negotiation, which is the aim of the Act, and disclosure is necessary and appropriate to carry out the purposes of the Act.

The Court properly holds that the Renegotiation Board is an "agency" within the meaning of the Freedom of Information Act, 5 U. S. C. § 552 (a). The Court also properly holds that § 552 (a)(3) of the Act, which grants the District Court jurisdiction "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant," makes that court the en-

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forcement arm of the FOIA. But it denies relief here on the ground that these contractors are obliged to pursue their "administrative remedy" before going to court for an enforcement order.

The Court relies on *Aircraft & Diesel Equipment Corp. v. Hirsch*, 331 U. S. 752, and other decisions of that vintage which established a judicial "hands off" policy in renegotiation cases until the case had reached the Tax Court (now the Court of Claims) stage. But those cases antedated the FOIA. That Act, contrary to what the Court says, had as one of its purposes "discovery for litigation purposes." Congress was concerned not only with the press and the general public when it lifted the veil of secrecy surrounding federal agencies but also with litigants. According to the Senate Report, the new FOIA was designed in part to "prevent a citizen from losing a controversy with an agency because of some obscure and hidden order or opinion which the agency knows about but which has been unavailable to the citizen simply because he had no way in which to discover it," S. Rep. No. 813, 89th Cong., 1st Sess., 7.

The FOIA deals with problems of discovery, to use a lawyer's term, and it does not leave the formulation of precise rules of discovery exclusively to the agencies themselves but, as noted, makes the District Court the enforcement arm of the Act.

Exhaustion of administrative remedies has skeins of various colors, *McKart v. United States*, 395 U. S. 185, 193-194. Ordinarily courts do not interfere until the agency has completed its action, *id.*, at 194, "or else has clearly exceeded its jurisdiction," *ibid.* The present case does not entail supplanting administrative expertise on the merits. The issues tendered concern only administrative procedure.

The court errs in saying that the contractors did not exhaust their administrative remedies. They strenuously

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sought the information mandated by the FOIA and exhausted all administrative procedure for obtaining it. That right to full disclosure, if not granted now, is forever lost. For as these contractors seek relief at a higher tier of the administrative process, the reviewing body will not consider whether the contractors could have negotiated settlements of a lesser amount if they had had access to the documents whose discovery is involved here. As Judge J. Skelly Wright said below:

"[I]t should be apparent here that if the contractors are to be granted relief at all they must have it now before the administrative momentum carries their cases beyond the point where the harm can be undone. If we take Congress' declaration of purpose seriously, then the parties are supposed to *negotiate* over excess profits at the lower administrative levels. The seemingly endless *de novo* reviews were intended to make the negotiating process work, not to provide a substitute for negotiation. If the negotiating process fails to occur, the opportunity is lost forever. To say that compulsory awards imposed by the Board or the Court of Claims at the end of the process provide an adequate remedy is to ignore the difference between an agreement freely arrived at, as preferred by Congress, and a judgment imposed by a court of law." 151 U. S. App. D. C. 174, 186; 466 F. 2d 345, 357.

The proceeding in the Court of Claims proscribes review of the Board. Title 50 U. S. C. App. § 1218 (1970 ed., Supp. II) states:

"A proceeding before the Court of Claims to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be

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treated as a proceeding de novo." (Emphasis added.)

There is no power, as I see it, for the Court of Claims to remand the case to the Board to cure any irregularity in its procedures. If these contractors are to have the remedy of full disclosure, it is now or never.

A procedure that accelerates settlements furthers the policy of the Renegotiation Act. The Board judges the profits of the contractors involved in the present case with the profits of other contractors in determining whether their profits are excessive. The relative prices, costs, and profits of those other companies are germane to the ultimate issue to be resolved. One of these contractors has a low "front office" overhead, as the executive officer is the president who has only a secretary. The rest of the employees are engaged in production. The contractor who has a low "front office" expense is penalized for efficiency, if its profits are reduced to the scale allowed contractors who have a high "front office" expense. The Board in its Regulations under FOIA makes "available for public inspection and copying summaries of facts and reasons issued by the Board," 32 CFR § 1480.5 (a). But an agency making decisions has no right to make secret the basis of those decisions,³ if the FOIA is to have any real meaning in the

³ The Board in its Regulations also provides:

"When a Regional Board has made . . . a final recommendation in a Class A case, . . . and the contractor is unable to decide whether to enter into an agreement for the refund of excessive profits so determined or recommended, the Regional Board or the Board, as the case may be, will furnish the contractor a written summary of the facts and reasons upon which such final determination or recommendation is based in order to assist the contractor in determining whether or not it will enter into an agreement: *Provided*, That the contractor requests such a statement within a reasonable time after it has been advised of such final determina-

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activities of the Renegotiation Board. If a contractor does not know the reasons why the Board or any of its agencies cuts the profits of a contractor 95%, it has no meaningful criteria to determine whether it should settle with the Board or continue to pursue its remedies up the escalator of the hierarchy. It is as if a court could rule for the plaintiff or for the defendant without ever having to disclose its reasons.

The result of today's decision is to put the citizen in a game of "blind man's buff" with the Renegotiation Board. Enforcement of the policy of full disclosure under the FOIA is no intrusion in the determination of the merits of the controversy before the Board. The expertise of the Board does not relate to the FOIA but only to the Renegotiation Act. The FOIA merely describes some of the procedure to be followed by the Board. *Aircraft* concerned the intrusion of the judiciary into the administrative process by a suit to declare the whole renegotiating procedure unconstitutional prior to any adjudication of the merits of the contractor's claim. Granting the relief asked in that case would have gutted the statutes. Granting the relief here would merely make the rules of discovery, established by Congress, applicable to the Renegotiation Board. Denial of the relief establishes a regime of secrecy when Congress has demanded disclosure and gives the Renegotiation Board a degree of administrative absolution⁴ at war with the philosophy of the FOIA.

tion or recommendation, and states that it has submitted all the evidence which it believes to be relevant to the renegotiation proceedings." 32 CFR § 1477.3. (Emphasis added.)

⁴ The hygienic effect of the Administrative Procedure Act is absent here because the Renegotiation Board is excluded from that Act by reason of 50 U. S. C. App. § 1221, the only exception being found in 5 U. S. C. § 552, at issue in this case.

The trend at the federal level has been the evolution of administrative agencies as principalities of power. The Administrative Procedure Act, 60 Stat. 237, was passed as an antidote to that development. It contained a provision in § 3, 5 U. S. C. § 1002 (1964 ed.), for disclosure of information by the agencies. But it was soon criticized because it was "full of loopholes which allow agencies to deny legitimate information to the public. It has been shown innumerable times that information is often withheld only to cover up embarrassing mistakes or irregularities and justified by such phrases . . . as—'requiring secrecy in the public interest,' 'required for good cause to be held confidential,' and 'properly and directly concerned.'" S. Rep. No. 1219, 88th Cong., 2d Sess., 8. As the House Report stated in support of supplanting § 3 of the Administrative Procedure Act with the FOIA "Government agencies whose mistakes cannot bear public scrutiny have found 'good cause' for secrecy."⁵ H. R. Rep. No. 1497, 89th Cong., 2d Sess., 6. As respects the role of the courts the House Report stated:

"The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen

⁵ For an account of the operation of the FOIA between 1967 and 1971 see Archibald, Access to Government Information—The Right Before First Amendment, in The First Amendment and the News Media, Final Report, Annual Warren Conference on Advocacy in the United States, June 8-9, 1973, p. 64.

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cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action." *Id.*, at 9.

The reluctance of the Court to require this administrative agency to live under the law calls to mind the admonition of Mr. Justice Stone speaking for the Court in *United States v. Morgan*, 307 U. S. 183, 191:

"Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should be construed so as to attain that end through coördinated action. Neither body should repeat in this day the mistake made by the courts of law when equity was struggling for recognition as an ameliorating system of justice; neither can rightly be regarded by the other as an alien intruder, to be tolerated if must be, but never to be encouraged or aided by the other in the attainment of the common aim."

I would affirm the judgment below.

END OF CASE